

90-496

No. \_\_\_\_\_

Supreme Court, U.S.

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JOSEPH P. SPANIOLO, JR.  
CLERK

In The  
Supreme Court of the United States  
October Term, 1990

MARTHA ZWEIG,

*Petitioner,*

v.

MICHAEL F. ZWEIG

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF VERMONT

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## QUESTIONS PRESENTED

Petitioner wife, a Vermont resident since fall, 1974, resists Vermont's grant of divorce to Respondent husband, Plaintiff below and a New York resident from 1968 to the present.

- I. New York denied plaintiff husband a divorce in 1980 upon finding that he had left his wife there in spring, 1974, "never to return." Vermont now grants him divorce on finding that he left his wife in spring, 1974, resumption of marital relations being not reasonably probable. In the intervening years both parties relied on the New York decision embodying their stipulation of severance of the economic issues to resolve them there, finalized in 1988.

Is Vermont's decision therefore repugnant to Full Faith and Credit under Article IV of the Constitution of the United States, 28 United States Code § 1738, and to Article 1, § 10 of the Constitution of the United States? Are husband's separation and related matters claim precluded and/or issue precluded?

- II. New York requires, for "no-fault" divorce, either the parties' written, signed separation agreement, or prior judgment of separation, itself obtainable on fault grounds only. Vermont's "no-fault" statute requires neither. Although husband is a New York domiciliary whose marital departure took place and continues there, and although his wife refused there to sign a separation agreement, Vermont has applied its own law instead of New York's.

Is Vermont's decision therefore repugnant to principles of Full Faith and Credit, conflict of law, and due process under Article IV and Amendments V and XIV of the Constitution of the United States?

**QUESTIONS PRESENTED - Continued**

- III. Effective February 12, 1981, Vermont amended its statute requiring residency in divorce plaintiff to permit nonresidents to bring divorce action against resident defendants. Vermont law also provides for wage attachment upon divorce parties' employers to enforce maintenance awards, but Vermont acknowledges these provisions jurisdictionally unenforceable against nonresidents.

Is Vermont's amended residency statute repugnant to due process and equal protection of the law under Amendment XIV of the Constitution of the United States, and Vermont without jurisdiction from the outset?

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF VERMONT**

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Petitioner wife, Martha Zweig, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Vermont which affirmed decree of divorce to Respondent husband.

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**OPINIONS BELOW**

The opinion of the Supreme Court of Vermont, not yet reported, and the Decree which it affirms, appear at A-1-7 and A-24-25, respectively; the trial court's decision appears at A-7-10. Opinion and judgment of the Supreme Court, New York County, New York, appear at A-11-16.

Other Vermont rulings appear in Appendix A as listed in the Table of Contents.

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## JURISDICTION

The Vermont Supreme Court entered its final judgment on June 1, 1990. It denied timely Motion for Reargument on June 25, 1990 (A-24), and this Petition is filed within 90 days thereafter. Decree of the Caledonia Superior Court was filed January 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 (a) and 2101 (c).

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## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves full faith and credit, impairment of stipulated contract, and due process and equal protection of state law under the Constitution of the United States, Article I, § 10; Article IV, §§ 1 and 2; Amendments V and XIV, and 28 U.S.C. § 1738. Petitioner seeks their application regarding: conflicting grounds for divorce in Vermont and New York, 15 VSA 551 and DRL 170 and 200, respectively; bar against retroactivity of statutory amendment in Vermont and New York, 1 VSA 213, 214, and McKinney's CLNY, Book I, §§ 52, 53, 58, respectively; Vermont's amended divorce residency statute, 15 VSA 592, and Vermont's provision for wage attachment upon divorce parties' employers, 15 VSA 780, 782, 787, void as to nonresidents, VRCP 80(o). New York CPLR provisions involved include: § 3107(a), relief appropriate to proof;

Rule 4511, mandatory judicial notice of sister state law without request; and Rule 5013, effect of dismissal. Relevant portions are set forth verbatim in Appendix B.

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### STATEMENT OF THE CASE

Respondent husband, a New York economics professor, converted to the communist Revolutionary Union in 1973-74 on Long Island (A-8, #4; C-40, 57-65, 69-71, 73-77, 80-82). Rejecting my pleas for counselling (C-60-62), he left me and our daughter Sierra, then age 3, in April-May 1974; moved to New York City, where he still resides; and began his relationship with his present companion that July. He brought me a separation agreement drawn by his New York attorney, which I refused to sign (C-65-66). In September-October Sierra and I moved to Vermont. She now attends college. Mr. Zweig brought his revolutionary colleagues to her high school graduation in June, 1988 (C-57-58, 80). He brought three divorce actions against me:

- I. New York: Index No. 35892-79, December, 1978 (A-11-16; C-1-6):

I was served in New York City. The complaint alleged Mr. Zweig's continuing 1974 separation as factual cause of action under nominal grounds of my abandonment and cruel and inhuman treatment, and my Vermont residency as both cause of action and jurisdictional fact (C-1-4, 43-44). I counterclaimed for dismissal on ground of his willful abandonment and determination never to

return (C-4-5). My uncontradicted affidavit on my Vermont Answer (C-39-40, 44-45, 47-48, 49, 229) attests our litigation in New York of the separation agreement refused; application of DRL 170(5), (6), and our relationships with others (mine since summer, 1976), and Mr. Zweig's wish to remarry. At New York trial, he urged the "dead marriage doctrine," part of the cruelty ground (A-3-4, 14; C-6, 8, 13, 19-20, 21, 28-29, 44-48). After 9-11 days' trial, New York found that he had indeed left "never to return," but noted our disagreement on "dead marriage." The court itself rejected that diagnosis and denied divorce. We stipulated severance of economic issues for later resolution "by this court." Mr. Zweig appealed "from each and every part" of the decision, based on the court's alleged "failure to consider the dead marriage doctrine." He did not perfect. The stenographic record was destroyed due to lapse of time (C-29, 39, 40, 49-50). No economic resolution was had until June, 1987, finalized March, 1988, favoring him, as I could not claim alimony with divorce denied.

## II. Vermont: S-98-87, July, 1987, Honorable Judge Meaker

Respondent again asserted our New York and Vermont residencies, pleading Vermont's "no-fault" ground. I claimed Full Faith and Credit to New York under Article IV of the Constitution of the United States; res judicata; collateral estoppel, and New York law (C-7-8, 10). Mr. Zweig asserted the conflict of law, and I declared my need of the New York transcript (C-9, 10). The court decreed involuntary dismissal for Mr. Zweig's failure to document the New York action (A-18-19), and directed us



to present law on the effect of New York's decision to the next trial court (A-17-18), noting the "salutary purpose" of the documentation rules to "avoid the unseemly prospect of inconsistent judgments."

III. Vermont: S-51-88, March, 1988, Honorable Judge Katz

I filed special appearance and Motions to Dismiss, denied at hearing (C-26-27). I asserted repugnance of the amended residency statute to Amendment XIV of the Constitution of the United States, since Vermont's wage attachment statutes for maintenance enforcement are void against nonresidents (C-25-26); my liberty interest in my marriage under Amendment XIV, Motion to Dismiss #2, C-22, irrebuttable presumption. I discussed Full Faith and Credit, and preclusion by New York's final decision on Mr. Zweig's marital departure "never to return," under jurisdictional claims of bar against retroactive effect of the residency amendment, and inadequate certification and substance in Mr. Zweig's New York documentation. I reserved the merits of Full Faith and Credit and preclusion themselves for affirmative defenses, so as not to waive them (C-23, 24, 27, 28) – especially since Mr. Zweig asserted those issues to be improper in a Motion to Dismiss (C-16, 18). The court (C-25-28) held alimony available, apparently by means of Full Faith and Credit; New York's jurisdiction and law not preclusive of Vermont law "later," and rested its jurisdiction on the amended residency statute. The court also said that its ruling

does not prevent the defendant from pursuing an affirmative defense of issue preclusion or

claim preclusion . . . and using whatever proof she may muster.

The court appeared to grant my request to hear affirmative defenses first, asking only when the evidence would be ready. Petitions for interlocutory appeal were denied with the jurisdictional issues preserved (A-19-21).

My timely Answer (C-36-50) raised the federal issues as follows:

Full Faith and Credit to New York's decision and law, despite hostile forum policy; forum-shopping; New York's superior interest in Mr. Zweig's conduct litigated there; Article IV, 28 U.S.C. § 1738; New York's jurisdiction sound: Answer #30, 34-37, 49, 51-58;

Res judicata; 1974 separation "never to return" same cause of action litigated to final decision in New York; collateral estoppel if causes of action are different; laches on loss of the New York record: Answer #4, 10, 15, 20, 21, 39, 41-64, Affidavit (C-49);

Conflict of law; Mr. Zweig bound by New York law; forum-shopping; New York's superior interest in his conduct initiated and continuing there; no divorce where I refuse separation agreement: Answer #7, 15, 18, 32, 37, 40, 51, 56, 58;

Willful desertion, fraud, purge by the Revolutionary Union: Answer #2, 4, 20;

Years of reliance on New York's decision for economic settlement, to my detriment: Answer #12.

My Answer, #4, again asked affirmative defenses to be heard first, and my accompanying letter noticed my

memorandum of law to come after the December holidays. Upon receipt, the court altered its calendar to advance trial to January 6, Affidavit January 3 (C-54-55). It denied continuance despite exemplified New York documentation still not received (C-51-52). At trial the court said that I had already filed a Memorandum of Law on the Motions to Dismiss, and that, at that time, it had "expected" to hold the New York action "irrelevant," (C-55-56). It then repeatedly denied all hearing of affirmative defenses (C-57, 67, 71, 72, 78, 83, 84) on ground that it had already determined them to be meritless. I objected, asserting prejudice (C-69, 72). The court excluded as "irrelevant" all testimony on what was litigated in New York, (C-67). It acknowledged its lack of economic jurisdiction over Mr. Zweig (C-84, 89 J). Relevant excerpts from the trial transcript appear at C-55-84. Post-trial motions for memoranda of law and hearing of affirmative defenses were denied without comment thereon (C-86-87; A-21-22).

The trial court (A-10) held that New York grounds do not affect Vermont authority at a later time; applied the amended residency law without further comment on equal protection; denied alimony in part due to length of time though subsequently noting Mr. Zweig's income four times mine (A-22) and did not discuss laches.

Six days after trial the exemplified New York documents arrived. I twice sought their admission and judicial notice under 28 U.S.C. § 1738. Granting my second application, the court added that "of course, they do not change the result" (C-84-86, 90-91; A-23).

Notices of Constitutional Questions to the Vermont Supreme Court appear at C-98, 173. My docketing materials, briefs, and Motions for Reargument, for Stay, and for Declaration of Federal Questions present them as follows:

Article IV, Full Faith and Credit; claim preclusion, same transaction; issue preclusion; Article I, § 10, contract; C-92, 110-165, 171-173, 179-205, 207-236;

Conflict of Laws; husband's New York residency; due process, Amendments V and XIV; New York's superior interest: C-94, 111, 120-122, 129, 131-132, 137-138, 141-149, 154-156, 159, 161-163, 172, 174-176, 179, 185, 189, 196-204, 212-215, 218-224, 226, 230-236;

Equal Protection, Amendment XIV: C-96-97; 99; 113; 117-119; 124; 165-173; 206-208; 214; 217-218; 234-236.

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### REASONS FOR GRANTING THE WRIT

Vermont herein upholds local law and its application against claims under the Constitution of the United States. Prior to September 27, 1988, this Court addressed such cases on appeal as of right. The purposes of appeal by right should weigh in favor of certiorari, especially since New York's final decision was in 1980 and husband's Vermont actions commenced in 1987 and in March, 1988.

Taken literally, Vermont's refusal to consider or declare upon the federal issues (C-215, 218, 231-236; A-7, 23-24) errs against due process and itself presents a federal question. Claims under the supreme law of the land

should not be held meritless without consideration (C-152). Under *Orr v. Orr*, 440 U.S. 268, 276; *Blackburn v. Alabama*, 354 U.S. 393, and *Dixon v. Duffy*, 334 U.S. 143, this Court may vacate and remand. It did so in *Kovacs v. Brewer*, 356 U.S. 604, 607, 608, to clarify whether or not changed circumstances had been asserted against Full Faith and Credit to modify a New York custody decree, and it would have in *Webb v. Webb*, 451 U.S. 493, 501-503, had Full Faith and Credit been asserted below as clearly as here. This Court remanded *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, #5, 205, to the Vermont District Court on whether that court should have applied New York law rather than Vermont's. *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, holds that "no other course assures . . . that state courts will not be the final arbiters of important issues of the federal constitution."

Absent remand, this Court takes jurisdiction where the effect below is to deny federal claims silently, *C. B. & Q. Railway v. Drainage Comm'rs.*, 200 U.S. 561, 580-581. Here, as in *C. B. & Q.*, those claims cover the whole case and so may not be ignored. Accord: *Norris v. Alabama*, 294 U.S. 587, 590; *Bryant v. Zimmerman*, 278 U.S. 63, 67; *West Chicago Railroad v. Chicago*, 201 U.S. 506, 519-520. *Volt Info. Sciences v. Stanford University*, 489 U.S. \_\_\_, 103 L.Ed.2d 488, 496, n. 4, recently held jurisdiction in such circumstances "regardless of the particular grounds or reasons on which the . . . decision is put." *Quinn v. Millsap*, 491 U.S. \_\_\_, 105 L.Ed.2d 74, 77-80, 82, 86-87, took jurisdiction where, as here, the decision below took federal Constitutional claims to be irrelevant.

No state procedural or timeliness grounds below excluded those questions independently of their merits in

this case. Certiorari is therefore warranted under *Harris v. Reed, Warden, et al.*, 489 U.S. \_\_\_, 103 L.Ed.2d 308, 311, 315-317; *Orr v. Orr*, 440 U.S. 268, #1(b), 274-275; and *Chambers v. Mississippi*, 410 U.S. 284, 290-291, n. 3.

Given the trial court's rulings against memoranda of law, hearing of affirmative defenses, and testimony on the New York trial, and its instruction that I need not make objections (C-60), the cumulative effect was, as in *Chambers*, frustration of my efforts to develop my defense pro se. Even so, the grounds of my federal claims were raised with fair precision and in due time upon the record as a whole, *Bryant v. Zimmerman*, supra, 67.

Since factual resolutions are entitled to Full Faith and Credit, *Thomas v. Washington Gas Light Co., et al.*, 448 U.S. 261, 281, fact of Mr. Zweig's 1974 departure "never to return," found in both New York and Vermont, with conflicting diagnosis and result, is interwoven with the federal Constitutional claims, as are preclusive effect thereof and conflict of law thereon. Review is therefore warranted under *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-285; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121; *Niemotko v. Maryland*, 340 U.S. 268, 271; *Craig v. Harney*, 331 U.S. 367, 373; *Williams et al. v. North Carolina*, 325 U.S. 226, 236; *Norris v. Alabama*, supra, 589-590; *Sterling v. Konstantin*, 287 U.S. 378, 398; *Fiske v. Kansas*, 274 U.S. 380, #3, 385-386; *Postal Telegraph Co. v. Newport*, 247 U.S. 464, 475; *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 164; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261; *Rogers v. Alabama*, 192 U.S. 226, 230-231.

Even if the New York action had never occurred, conflict of law upon Mr. Zweig's New York residence, his



abandonment and my rejection of the separation agreement there, and equal economic protection for me in Vermont law, all present themselves independently under Amendments V and XIV.

However rare denials of divorce may presently be, conflict of law is common. Our transcendent principles of federalism compel recognition and resolution in any case where their erosion is threatened, *Orr*, supra, 285.

Live controversy remains even if Mr. Zweig may allege that he has remarried, *Williams v. North Carolina I and II*, 317 U.S. 287; 325 U.S. 226.

Vermont repeatedly overlooked cases with which its decision directly conflicts, asserting I had cited none (A-5, 24). They include: *Lambert v. Lambert*, 316 SW 2d 822; *Babcock v. Babcock*, 146 P 2d 279; *Ashton v. Ashton*, 94 SW 2d 1033; *Ball v. Ball*, 76 SW 2d 71; *Silverman v. Silverman*, 283 P 593; *Krzepicki v. Krzepicki*, 140 P 13; and *Kelly v. Kelly*, 87 SE 567, explicit and implicit progeny of *Harding v. Harding*, 198 U.S. 317, on Full Faith and Credit, continuing separation, and denial of divorce (C-126, 181, 184, 213, 216, 225-226, 227). The decision conflicts in principle with numerous decisions of this Court and the Federal Appeals Courts, cited herein and throughout Appendix C.

*Alton v. Alton*, 207 F.2d 667, #7, 9, 674-677, cert. granted 347 U.S. 911, moot 347 U.S. 610, held that due process under Amendments V and XIV requires forum residency in divorce plaintiff, as foreshadowed in *Williams et al. v. North Carolina*, 325 U.S. 226, 238; *Sherrer v. Sherrer*, 334 U.S. 343, 362-363, dissent, harmonious with the majority view as to *Zweig*; *Sosna v. Iowa*, 419 U.S. 393,

#3(a), 406-407; and *Makres v. Askew*, 500 F.2d 577, #3, 578-579, indicating a "compelling interest" of the states involved. *Kulko v. California Superior Court*, 436 U.S. 84, 85 (d), (e), 96-98, holds New York the proper forum for adjudication on "basic considerations of fairness" where controversy arises from a separation that occurred there and one of the parties remains there. The marital res follows the *domicile* of plaintiff, *Carr v. Carr*, 400 NYS 2d 105, 109.

Under *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U.S. 150, 153, Amendment XIV also requires that parties "enter the courts upon equal terms," emphasis mine. Since divorce parties, however designated, may become either plaintiff or defendant economically, this principle is especially important in divorce. Here, Mr. Zweig and his employer were jurisdictionally exempt at the outset from Vermont's wage attachment statutes for maintenance enforcement, which could operate only against me in his favor, and not vice-versa. Vermont's amendment of its residency statute has thus rendered its economic statutes perverse and underinclusive, installing assymetry like that contemplated in *Burnham v. Superior Court of California*, 495 U.S. \_\_\_, 109 L.Ed.2d 631, 657. Even if Full Faith and Credit could enforce in New York an economic order of dubious jurisdiction in Vermont, availability of alternate procedure does not deflect Amendment XIV challenge, *Stanley v. Illinois*, 405 U.S. 645, 647 – especially where the alternative is federal in nature, because equal protection is an *internal* requirement: Vermont's *own* laws must apply equally in their operation and effect to all Vermont residents similarly situated relative to the statutory purpose. Residence of spouse is wholly irrelevant to,



and no proxy for, the purposes of maintenance and its enforcement. I have standing even though Vermont denied me maintenance, as did *Orr* petitioner, who had stipulated below to pay alimony rather than receive it; the unequal statutory burden is enough. See also *Texas Monthly, Inc. v. Bullock*, 409 U.S. \_\_\_, 103 L.Ed.2d 1, 4. Jurisdiction in divorce action by nonresident plaintiff, if permissible at all, should be conditioned upon absence of any economic claim, since plaintiff chooses the forum.

Even if Vermont had legitimate jurisdiction, this Court is "the final arbiter . . . as to what is a permissible limitation on the full faith and credit clause," *Johnson v. Muelberger*, 340 U.S. 581, 585, citing *Williams I* at 302. Divorce conflicts "can be left to neither state," *Williams II* at 232. This Court "must determine for itself" the relationship between Full Faith and Credit and conflict of laws, *Pacific Employers Insurance Co. v. Industrial Accident Comm'n.*, 306 U.S. 493, 502.

Preclusive effect is no advance test of Full Faith and Credit. Only finality of decision and validity of prior jurisdiction are. Full Faith and Credit requires that forum policy give way to hostile policy in the first state; a matter of greater, rather than lesser, importance in the vital interests of divorce litigation: *Sherrer*, supra, 356; *Johnson v. Muelberger*, 340 U.S. 581, 584; *Williams I* at 294, 302-303; *Williams II* at 249, 250, 252-255, dissent harmonious with the majority view as to *Zweig*. Against *Lillis v. Lillis*, 563 P.2d 492, 495 (C-223), Vermont has reversed the proper sequence of addressing Full Faith and Credit and preclusion, permitting itself precisely the forum public policy exception to res judicata which Full Faith and Credit forbids; to like effect applying the substantive

"identical grounds and evidence" test instead of the modern test of unitary transaction litigated (A-2-3; C-4-5, 8, 14-15, 23, 45-46, 48, 79, 88-89, 92, 95, 98, 100, 101, 103, 104, 110, 152-158, 162, 172, 180-185, 213, 216-217, 223, 225-229).

Denial of divorce for failure to make out a case under New York law goes only to merits, not jurisdiction, and cannot be shown collaterally to avoid Full Faith and Credit or to defeat res judicata, *Hunt v. Hunt*, 72 NY 217, 229, 230, widely cited for over 100 years. If Mr. Zweig's marital departure "never to return" could not stand alone in New York (A-4), no jurisdictional objection can be made of that fact after judgment, *Matter of Anthony J.*, 143 App. Div. 668, 669; *Matter of Rougeron*, 17 NY 2d 264, 271, 270 NYS 2d 578, #5, 6; *Carr*, supra, #6. Otherwise, all decisions against plaintiffs would be, *ipso facto*, without jurisdiction, and Full Faith and Credit could apply only when plaintiffs win.

This Court long ago repudiated Vermont's present reasoning: *Royal Arcanum v. Green*, 237 U.S. 531, 545-546; *Haddock v. Haddock*, 201 U.S. 562, 563, 570, 577-581; *Williams I*, #6, 292, 293, 299-300, 304, 307; New York following, *Russo v. Russo*, 62 NYS 2d 514, 518, quoted at C-198. *Royal* reversed New York for holding a Massachusetts judgment "irrelevant" on deeming Massachusetts law inapplicable; Article IV necessarily entails application of the law of the state that first gave judgment. *Williams I* firmly overrules *Haddock* for permitting a second divorce action in the wife's state, and for holding the marital res divisible, partly present in each party's state, with Full Faith and Credit subject to forum policy. No one suggests that New York failed to apply its own policy in *Zweig*, or that it would now reopen the case to grant divorce based

on Vermont policy – especially since CPLR 4511 required the New York court to notice Vermont law, without request, in the first place (B-14-15).

Full Faith and Credit must be granted first, and claim preclusion assessed thereafter on the basis of factual transaction litigated, in order to guarantee exclusion of Vermont policy considerations embodied in “grounds” and “evidence.” The *Zweig* transaction litigated in New York is Mr. Zweig’s 1974 marital departure “never to return;” it includes the separation agreement offered and refused, New York “no-fault” grounds, our other relationships and his wish to remarry, as well as our residencies, which themselves cannot be relitigated, *Sherrer*, supra, 348, 355-356. Given Vermont’s refusal to notice my uncontroverted affidavit on my Answer, exclusion of testimony on the New York trial, and dismissal of my laches defense on destruction of the New York record (C-229, A-24), its holding that I have not “shown” litigation of “no-fault” in New York is circular and fundamentally unfair.

Policy conflict aside, Mr. Zweig and Vermont say res judicata will not apply because his departure is “continuing”. But *Harding*, supra, 338-339, anticipating the modern view of preclusion, bars divorce precisely *because* the separation was continuing from the same date asserted in the first action. New York has applied the transaction criterion of preclusion for decades (C-132, 180-182, 187-189, 192, 195-197), *Braunstein v. Braunstein*, 497 NYS 2d 58, #7, 63, and bars continuing grounds of desertion and adultery as res judicata from dismissal of prior suit on cruelty, *Zizzi v. Zizzi*, 306 NYS 2d 961. Nominal “grounds” don’t matter (C-127-128, 183-185, 225-226). See also *Greer v. Greer*, 77 P 1106; 142 Cal. 519, 523-524; *Cox v.*

*Cox*, 163 Ga. 93, #1; *Mine Workers v. Gibbs*, 383 U.S. 715, 725. To argue an end of the 1974-"never" transaction litigated in New York, Mr. Zweig would have to show an intervening period of reconciliation, with a new and distinct separation occurring thereafter (C-46, 89, 95, 105, 117, 152, 182-183, 227, 228). Similarly, parties denied child custody cannot reopen decision in the same or other state based on the "continuing" situation and passage of time alone. They must show *change* of circumstances, *Kovacs v. Brewer*, 356 U.S. 604, 608.

*Reynolds v. Reynolds*, 117 So. 2d 16, 20, and *Gordon v. Gordon*, 59 So. 2d 40, 43, properly employ the "continuing" analysis to compute statutory time requirements not met in prior action. But statutory separation time in New York is one year, and Mr. Zweig filed action there almost five years after he left me. Adaptation of the "continuing" analysis to make his separation a cause of action ever-renewable after final adverse judgment simply denies all effect to New York's decree, *Harding*, *supra*, 338-339 (C-121, 126-127, 139, 153, 156, 158, 181, 182, 184, 225). Otherwise, exactly *how long* is finality final? Vermont's view is, at best, unconstitutionally vague.

Even if grounds and evidence, rather than transaction, were the test, collateral estoppel, or issue preclusion, will bar common issues where causes of action differ, *Reynolds* at 21, *Gordon* at 44. *Lytle v. Household Mfg. Inc.*, 494 U.S. \_\_\_, 108 L.Ed.2d 504, 516, recently cites *Montana v. U.S.*, 440 U.S. 147, 153-154, on the importance of collateral estoppel against multiple lawsuits and inconsistent decisions. Vermont (A-4) explicitly holds the "dead marriage" claim litigated in 1980 "part of" New York's cruelty ground. Mr. Zweig's willful abandonment, the main

point of my New York counterclaim on "the real cause of seeking divorce" was a "material and necessary" issue under the cruelty ground, *Bloom v. Bloom*, 384 NYS 2d 181, #2, quoted at C-228-229. *Harding* holds at 338 that, for purposes of Article IV and preclusion, the issues of desertion and absence without fault are "identical." Litigation of matters in New York not raised in Vermont, such as cruelty, does not stand against preclusion – it would have to be the other way around, presentation of issues in Vermont not heard in New York (C-227).

Against these arguments and authorities, Mr. Zweig and Vermont rely on *Lillis*; *Booker v. Booker*, 465 NYS 2d 39; and *Carratu v. Carratu*, 415 NYS 2d 835, 409 NE 2d 929. Like *Gordon* and *Reynolds*, these present no conflict of law. *Carratu* turns on new acts of physical abuse, and notes at #1 that claim based on the same evidence ("never to return," in *Zweig*) would indeed be barred. *Booker* discloses nothing of the nature of prior action, but rests itself on *Falconi v. Falconi*, 91 AD 2d 1058, in which the prior dismissal was by consent in separation action, with no findings adverse to plaintiff, as in *Reynolds* – wholly unlike *Zweig*. *Lillis* defendant sought bar only as to matters existing prior to the first trial – Missouri had made no finding like "never to return." *Lillis* notes at 495, #6, 7, that its incompatibility grounds (nonexistent in either New York or Vermont) do not involve conduct, and specifies that abandonment is conduct.

If the New York action had never taken place, Article IV and Amendments V and XIV would still require Vermont to apply New York Law in *Zweig* and deny divorce on my rejection of the separation agreement and continuing objection to separation (C-77). But Vermont takes the



"contrast" of law (A-3) only as a reason to deny preclusion and apply forum law, without assessment of forum-shopping and of New York's interest in its own exclusive power to regulate Mr. Zweig's conduct and status by the domiciliary laws he is obliged to obey "however harsh and unjust they may be thought to be," *Williams II*, 241. Against *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820-821, 834-835, n. 17, Vermont takes its own assumption of jurisdiction as the sole factor in choice of law, decreeing outcome openly opposite to what New York requires. Even the *Alton* dissent, 207 F.2d 667, 684-685, which would permit a residency law like Vermont's, would also require application of the substantive law of the state where the conduct resulting in estrangement took place; see also *Kulko*, 436 U.S. 84, 96-98. Our expectations rested on New York law: *Phillips*, 822. Mr. Zweig committed and continues his abandonment there; we both knew rejection of the separation agreement there to be a fact of legal consequence; Mr. Zweig positively *invoked* New York law upon our situation years after I had gone to Vermont, and we both relied on New York law for another seven years to resolve economic issues. Vermont declined to address conflict of law, including its own precedents. (C-197-204, 220-222; A-24).

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### IMPORTANCE

Divorce will soon end two-thirds of American marriages, *New York Times*, October 4, 1984. The consequent "feminization of poverty" usually governs the children as well. The fact that divorce is rarely denied these days underscores the importance of this case – for the conflict

of law between New York and Vermont starkly exposes some states' application of "no-fault" divorce to defeat marriage altogether, reinstating the harsh and primitive institution of willful abandonment instead: a grave miscarriage of justice, the fraud eloquently denounced by the Supreme Court of Florida, *Ryan v. Ryan*, 277 So. 2d 266, 271-273, quoted at C-143-144.

New York's law fully accomplishes the humane and progressive purposes of "no-fault" divorce when *both* parties want to separate. But it draws the line against divorce on demand to persons determined to abandon their families without cause. So, in *Zweig*, New York holds my husband's departure "never to return" *not* an irreconcilable separation, a determination forever conclusive and binding on us, entitled to Full Faith and Credit. Vermont has no authority even to inquire: cases at C-128, 138-139, 154-158, 193. Nor will New York construe denial of divorce as equivalent to a separation agreement or judgment, *Peck v. Peck*, 356 NYS 2d 517, 520.

Unlike Florida, Vermont and New York both maintain fault-oriented grounds in divorce, including willful abandonment (B-4-5, 11-13). In *Bell v. Burton*, 402 U.S. 535, 536-537, this Court unanimously held violation of due process in suspension of a driver's license without regard to fault, within a fault-oriented scheme. Vermont divorces do have hearings, but fault is irrelevant, regardless of the facts, when a plaintiff asserts the "no-fault" ground (C-68). Vermont takes a plaintiff's mere *refusal* to entertain reconciliation as conclusive on the court, *Tabakin v. Tabakin*, 303 A.2d 816, 818 (A-5). "Resumption of relations not reasonably probable" is thus subjective in interested plaintiff determined to abandon his family, and wholly

independent of judicial inquiry. Plaintiff establishes controlling fact simply by willing it; defendant's will to the contrary has no force whatsoever. Whether as conclusive presumption or substantive rule of state law, Vermont's disregard of the crucial difference between consensual separation or divorce and willful abandonment effectively decrees what no Vermont statute says outright: that *any married person abandoning and determined to abandon his family shall be entitled to a divorce* (C-68) – a proposition that New York forthrightly rejects.

However overwhelming the number of divorce cases, "the constitution recognizes higher values than speed and efficiency," *Stanley v. Illinois*, 405 U.S. 645, 656, child custody. Because the institution of the family is fundamental to our society and traditionally protected, the liberty interests guaranteed by Amendment XIV require assessment of conclusive presumptions or substantive state rules and practices thereon in terms of what policy they serve, *Moore v. East Cleveland*, 431 U.S. 494, 502-503; *Michael H. et al. v. Gerald D.*, 491 U.S. \_\_\_, 105 L.Ed.2d 91, 105-106, n. 2, 3. *Michael H.* upheld a presumptive rule because it served to *protect* the marital family – but the effect of institutionalizing willful abandonment is wholly opposite.

Amendment XIV should sustain policy and law like New York's against practice like Vermont's. Any liberty interest in divorce should be distinguished from an asserted liberty interest in willful abandonment, and compared to a spouse's liberty interest in the marriage. The law already protects a unilateral liberty interest in divorce on fault grounds, which a "no-fault" law like New York's adequately extends. But a liberty interest in



willful abandonment, if sustained by the courts, renders the marital family itself a cruel illusion, protecting it no more than unmarried cohabitation.

Petitioner therefore takes this Court's Full Faith and Credit divorce precedents of the 1940's to declare basic, overriding principles of federalism that will logically hold against forum-shopping as firmly when divorce is denied as when it is granted. If spouses or legislatures are to be encouraged at all in efforts to preserve marriage and the family, criteria for denying divorce must be protected to at least the same extent as criteria for granting it, against "efficious intermeddling" by other states, *Sosna v. Iowa*, 419 U.S. 393, 406.

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### CONCLUSION

Wherefore, Petitioner prays that this Court reverse the decision of the Vermont Supreme Court below; or vacate and remand for consideration of the federal questions; or issue a Writ of Certiorari for review. If her Petition is granted, Petitioner prays that the decision below and the Decree it affirms be reversed and remanded with direction to dismiss Respondent's action.

Respectfully submitted,

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APPENDIX A - OPINIONS BELOW

No. 89-120

Michael F. Zweig

v.

Martha MacNeal Zweig

Supreme Court

On Appeal from  
Caledonia Superior  
Court

April Term, 1990  
JUN 01 1990

Matthew I. Katz, J.

Rubin, Rona, Kidney & Myer, Barre, for plaintiff-appellee

Martha MacNeal Zweig, pro se, Hardwick, defendant-  
appellant

PRESENT: Allen, C.J., Peck, Gibson, Dooley and Morse,  
JJ.

PECK, J. This is an appeal by defendant wife from a divorce decree entered upon a finding that the parties had lived apart for six months and that the resumption of marital relations was not reasonably probable. 15 V.S.A. § 551(7).

The parties were married in Philadelphia in 1965 and moved to New York State. In 1974, plaintiff husband left the marital home and moved to New York City, where he still resides. Defendant wife moved to Vermont in the fall of that year and has lived in this State ever since. Both parties have cohabited with other individuals for over ten years. The only child of the marriage will be twenty years old in November of this year.

In December, 1978, plaintiff filed an action for divorce in New York State on the grounds of constructive

abandonment and cruel and inhuman treatment. Defendant contested the action, and counterclaimed, seeking custody, child support, and maintenance. The court severed the custody and support issues, and the matter was tried on the divorce complaint alone. In July, 1980, the court dismissed the action, stating that plaintiff had failed to prove his allegations of constructive abandonment and cruelty.

After considerable lapse of time, in March of 1988 the New York court ordered plaintiff to pay child support of one hundred dollars per week retroactive to January 1, 1985; to maintain medical, dental, and life insurance for his daughter's benefit; and to pay all medical and dental bills in excess of one hundred dollars a year that are not covered by insurance. The support order remains in effect until his daughter's twenty-first birthday in November, 1991.

In 1988, plaintiff brought an action for divorce in Vermont pursuant to 15 V.S.A. § 592, alleging an irreconcilable separation exceeding six months. The court granted the divorce and denied maintenance to defendant. This appeal ensued.

On appeal, defendant challenged the trial court's jurisdiction to grant the divorce, asserting that the matter is *res judicata* because of the prior New York decision. Defendant is correct that if an initial suit for divorce is brought in a different state than the second suit, a judgment on the merits for the defendant bars a subsequent divorce action on identical grounds where the evidence will be essentially the same. See *Slansky v. Slansky*, 150 Vt. 438, 441, 553 A.2d 152, 154 (1988); *Gordon v. Gordon*, 59 So.

2d 40, 43-44 (Fla. 1952). The inquiry here, then, is whether these two divorce actions were brought on the same grounds and on the same evidence. We hold that they were not.

Plaintiff asserted cruelty and constructive abandonment as ground for the New York divorce, not an irreconcilable separation of more than six months. N. Y. Dom. Rel. Law § 170 (McKinney 1988) permits no-fault divorce only pursuant to a one-year separation under a court decree or written agreement; neither is present in this case. Vermont's divorce statute, by contrast, does not require a written agreement or court decree; rather, it allows divorce after the parties have lived apart for six consecutive months, upon a finding that resumption of marital relations is not reasonably probable. 15 V.S.A. § 551(7). We decline to hold that, in this case, these statutory bases are so similar as to constitute identical grounds.

In any event, plaintiff's suit in New York did not rely on that state's no-fault provisions, N. Y. Dom. Rel. Law § 170(5), (6) (McKinney 1988), but instead on the grounds of constructive abandonment and cruelty. Defendant has not shown that the New York court considered that state's no-fault grounds in reaching its decision. The court's opinion clearly states that a divorce was sought and denied on the grounds of constructive abandonment and cruelty. At the conclusion of the opinion, a handwritten insertion mentions the "dead marriage" doctrine. Defendant attempts on appeal to establish that New York's "dead marriage" doctrine is in reality another name for irreconcilability, or some similar no-fault basis for divorce, which the New York court considered and

rejected in the prior action. Defendant argues that in New York, grounds of cruelty can encompass the "dead marriage" doctrine. *Hessen v. Hessen*, 33 N.Y.2d 406, 410-11, 353 N.Y.S.2d 421, 426, 308 N.E.2d 891, 894-95 (1974); *Berlin v. Berlin*, 64 Misc. 2d 352, 355-56, 314 N.Y.S.2d 911, 916 (1970). Nevertheless, the doctrine is still part of the grounds for cruelty, and cannot stand alone under New York law as a distinct, no-fault basis for dissolution of a marriage. *Brady v. Brady*, 64 N.Y.2d 339, 345-46, 486 N.Y.S.2d 891, 895, 476 N.E.2d 290, 294 (1985); *Berlin*, 64 Misc. 2d at 353, 314 N.Y.S.2d at 913.

Defendant further asserts that plaintiff "acknowledged . . . that the issue of irreconcilable separation was tried and determined in New York," citing plaintiff's memorandum in opposition to defendant's motion to dismiss. That document contains no such acknowledgment, stating only that "even if" the matter had been raised in New York, plaintiff was not precluded from bringing suit in Vermont on a continuing cause of action. Defendant's *res judicata* argument, therefore, is meritless.

Even if plaintiff's claims in both lawsuits were identical, he is not forever precluded from alleging and proving irreconcilable separation in a later proceeding. "[A]pplication of *re judicata* . . . does not preclude [a party's] ability to rely upon facts and circumstances existing after [an adjudication upon the merits]." *Lillis v. Lillis*, 1 Kan. App. 2d 164, 168, 563 P.2d 492, 495 (1977). Moreover,

[i]t is apparent in the physical nature of things that where the law requires that the act . . . be continuous for a specified period of time immediately prior to the commencement of the action,

successive suits for divorce on [those grounds] necessarily involve separate and distinct factual situations in respect to that time element.

*Reynolds v. Reynolds*, 117 So. 2d 16, 20 (Fla. 1959) (emphasis omitted). The court need only find that the separation had lasted for the requisite statutory period on the date the case came to trial. The policy underlying no-fault dissolution of marriages recognizes that divorces should be granted when a marriage has broken down, so that the parties may be free to form other, and, it is hoped, happier alliances. Defendant has cited no authority, and we find none, for the proposition that an action for divorce cannot be brought on grounds present in the years following a prior, unsuccessful suit. The weight of authority is to the contrary. *Booker v. Booker*, 96 A.D.2d 522, 522, 465 N.Y.S.2d 39, 39-40 (1983); *Carratu v. Carratu*, 70 A.D.2d 503, 504, 415 N.Y.S.2d 835, 836 (1979), *aff'd*, 50 N.Y.2d 941, 942, 431 N.Y.S.2d 455, 456, 409 N.E.2d 929, 930 (1980).

Husband and wife have lived apart for over fifteen years, and both have long-term relationships with other individuals. Under these circumstances, we cannot find error in the court's finding that the separation exceeded six months, and that the resumption of marital relations was not reasonably probable. It is axiomatic that "there can be no true reconciliation without a good faith effort on the part of both parties." *Tabakin v. Tabakin*, 131 Vt. 234, 236, 303 A.2d 816, 818 (1973). Plaintiff has made it abundantly clear that for him, the marriage is over. It is the function of this Court to review and uphold judgments granting divorce if the record permits. *Boone v. Boone*, 133 Vt. 170, 171, 333 A.2d 98, 99 (1975). The trial



court's determinations are fully supported by the evidence.

With respect to the issue of maintenance, this Court defers to the trial court's broad discretion in fashioning an award of maintenance or denying such an award. *McCrea v. McCrea*, 150 Vt. 204, 207, 552 A.2d 392, 394 (1988). A party challenging the trial court's action must show that the award or lack of it, has no reasonable basis to support it. *Quesnel v. Quesnel*, 150 Vt. 149, 151, 549 A.2d 644, 646 (1988). Defendant has failed to meet that burden here. The evidence showed that she is well educated, that her companion contributed to household expenses, that she owns real property unencumbered by a mortgage, and that she has steady employment. Plaintiff's net worth is approximately \$1000, and the parties split their property approximately equally at the time they separated in 1974. Under the circumstances, we cannot find that the trial court's refusal to award maintenance was unsupported by the evidence.

Defendant claims that she was treated unfairly in the trial court. The transcript of the trial shows no foundation for her assertion. She further maintains that the statute of limitations and doctrine of laches are a bar to plaintiff's suit. In view of our determination that plaintiff's second action is not *res judicata*, these claims are unfounded.

Defendant also challenges the application of 15 V.S.A. § 592, contending that it cannot be applied because the cause of action accrued prior to the statute's amendment, which permitted out-of-state residents to sue in-state residents for divorce in Vermont courts. However, "the overwhelming weight of authority supports retroactive

application of legislative creation or amendment of divorce grounds, unless the statutory language employed precludes such a construction." *Gleason v. Gleason*, 26 N.Y.2d 28, 36 n.5, 308 N.Y.S.2d 347, 352 n.5, 256 N.E.2d 513, 517 n.5 (1970) (citing cases from twelve jurisdictions). The Vermont statute includes no such limitation. Furthermore, it is the function of the legislature, not this Court, to determine the consequences of statutory revision.

Defendant raises numerous constitutional arguments in her brief, claiming violations of due process, equal protection and full faith and credit. These assertions are decidedly without merit, and we decline to consider them here.

*Affirmed.*

FOR THE COURT:

/s/ Louis P. Peck  
Associate Justice

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STATE OF VERMONT  
Caledonia County, ss.:

SUPERIOR COURT  
Docket No. S 51-88 CaF

MICHAEL F. ZWEIG

] FILED

V.

] JAN 9, 1989

MARTHA MACNEAL ZWEIG

] Cecile M. Rainville

] Deputy Clerk

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Based upon the evidence presented at trial, the following decision is announced:

1. These parties were married in 1964, separated in 1974, and have never lived together in the fourteen years since that time.

2. For fourteen years the husband has resided in or near New York City, the wife has resided in Hardwick, Vermont, on land which she owns.

3. During that period of time the husband has been steadfast in his refusal to consider any reconciliation; in the wife's words he has been a "stone wall."

4. The separation was at the instance of the husband. Although it may initially have been due in part to the influence of some revolutionary communist movement to which he adhered at the time, his continued determination to live separate and apart from the wife reflects his own free will and decision.

5. One child was born of the marriage, who is now eighteen and at Northwestern University.

6. The husband paid child support throughout the separation, although he unilaterally lowered the amount of that support from what it had been at first. The wife finally obtained a more favorable support order in 1988. There was no evidence that the husband was responsible for that extraordinary delay in obtaining an order.

7. The husband commenced living with another woman in the mid-1970's, whom he has desired to marry for many years. The wife has been living with another man for ten years.

8. The wife steadfastly refuses to accede to a divorce and has contested every effort of the husband to obtain one.

9. In 1980, his efforts to secure a divorce were denied by a court in New York.

10. The wife has bachelor's and master's degrees from the University of Michigan, she has steady employment, she owns a house and land on which there is no mortgage, she is steadily employed, and she lives with a man who contributes to the household expenses.

#### CONCLUSIONS OF LAW

A. Due notice has been provided the wife of this divorce proceeding.

B. The parties were lawfully married and have never been divorced, so they remain married to this date.

C. The wife is a permanent resident of Caledonia County, Vermont, and was so at the time this proceeding was commenced.

D. The parties have lived separate and apart for a period in excess of fourteen consecutive years.

E. There is no reasonable likelihood of reconciliation. After fourteen years, in which the husband has persisted in efforts to obtain a divorce, despite monumental opposition on the part of the wife, any reconciliation is almost inconceivable.

F. The New York decision denying divorce is in no way preclusive of the present action. It cannot speak to the facts which postdate it, and those alone constitute

eight consecutive years of living separate and apart, with no likelihood of reconciliation. The grounds upon which New York may grant or deny a divorce do not affect the authority of Vermont to grant a divorce at a later time, if grounds therefore are proven, as they have been here. Even if the prior decision found that reconciliation were very likely, that only would demonstrate the facts that existed as of the time of that decree, not what obtains today.

G. This court has jurisdiction to grant a divorce, as the wife is a resident of this county for more than one year. 15 V.S.A. §592. The fact that another court may have once also had jurisdiction does not divest this court of such, based on present and ongoing resident of one of the parties in this state.

H. Defendant's affirmative defenses are wholly lacking in merit.

I. Nothing in this decision supercedes the personal judgment against him in New York for ongoing support of the daughter.

J. Defendant is not entitled to alimony. 15 V.S.A. §752. She is presently enjoying a better standard of living than over most of the past fourteen years, which of course constitute more than half the total period of marriage. Defendant is well educated and has a substantially greater net worth than does plaintiff, although his salary is significantly higher.

K. Grounds for divorce have been shown, decree nisi to become absolute April 6, 1989.

Attorney for husband to prepare decree.

---

SUPREME COURT : NEW YORK COUNTY  
TRIAL TERM : PART 12

---

MICHAEL ZWEIG,

Plaintiff,

Index

No. 35892/79

-against-

MARTHA ZWEIG,

Defendant.

---

(EXEMPLIFIED)

BLANGIARDO, J.:

Plaintiff husband, Michael Zweig, brings this action for divorce based on cruel and inhuman treatment, and abandonment. In addition thereto, plaintiff seeks joint custody, attorneys fees, court costs and disbursements, and for such other relief as this court may deem just and proper.

Defendant wife, Martha Zweig, sets forth in her answer a denial, as well as the affirmative defenses of statute of limitations and failure to state a claim. Martha Zweig also seeks custody of the infant child, support and maintenance, attorneys fees, and such other relief as the court deems just and proper.

As stipulated on the record and by agreement between the parties, the sole issue presently before this court is that of divorce. The parties are presently engaged in resolving the issues of custody, support and attorneys fees.



The parties herein were married on June 20, 1965, in Philadelphia, Pennsylvania. There is one child of the marriage, a daughter, Sierra, born on November 25, 1970.

Plaintiff has since the completion of his Ph.D been employed as a professor in Economics, at Stonybrook College. Defendant, a published poet with a Master's degree in English, is currently employed as a factory worker in Vermont.

Plaintiff testified to various incidents regarding the defendant's continuous conduct throughout the marriage, attempting to reveal a course of conduct intentionally evidencing a total disregard of plaintiff's physical, emotion and mental well being.

The facts disclose that as of May 1, 1974, the plaintiff did in fact leave the defendant and his home, never to return. That this action was commenced on December 26, 1978 by plaintiff on the grounds above stated.

The five-year statute of limitations commences on December 26, 1973 and of necessity all acts of cruelty, etc. must have an origin within the 5 year statutory period.

However, this court has permitted testimony predating the statute, insofar as such prior incidents might present a course of conduct or pattern which would explain those alleged incidents occurring within the prescribed 5-year time frame.

The evidence discloses the parties' deeply rooted political activities and ideologies, resulting in a life style other than would be expected of a young married couple. Their way of life was acceptable, voluntarily agreed



upon, and its course pursued by both. Granted that plaintiff may have been more politically and socially active than his wife, and granted further that defendant had strong feminist beliefs, their conduct must be examined and evaluated as it affected each other.

Defendant's feminist ideology as interpreted and followed by her, may be considered by some as too restrictive and rigid, causing a strain on a marital relationship. However, this court must determine what effect, if any, it had upon this plaintiff.

An examination of the testimony reveals that in many instances plaintiff's own ideals agreed and supported defendant's beliefs.

A full examination of all the testimony and all the incidents complained of leads this court to conclude that for the 4 to 5 month period immediately preceding plaintiff's leaving, this defendant's efforts and conduct were guided toward saving her marriage.

The specific acts from December, 1973 on, even if believable, cumulatively are not sufficiently substantial to warrant a dissolution of the marriage. There may have been annoyances, but certainly the incidents did not constitute cruel and inhuman treatment. Nor did the plaintiff consider it such.

Defendant's explanations of the child - table incident and the sunburn incident - that she was unaware of the happening and that she did not realize the effect of the sun - in the absence of evidence to the contrary, are acceptable.

Defendant's description of the social gatherings may have justified her hesitancy and occasionally refusing to attend. In fact, reasonable explanations of all the incidents were offered in rebuttal of plaintiff's accusations, to wit, Martha's general disdain for Michael's friends was seated in her unwillingness to acquiesce to a moral code and social norms which she found reprehensible.

As to the charge of constructive abandonment, the testimony of both plaintiff and defendant conflict and fail to establish the allegation that defendant refused to have relations with the plaintiff. In fact, the Court finds that the defendant was willing to cohabit in her efforts to save her marriage.

The Steinberg incident and all other allegations are trivial and require no comment. The parties are not in agreement as to the "Dead Marriage" diagnosis. Nor is this Court.

In conclusion, based on the credible evidence, plaintiff having failed in the proof required to support the causes of action for divorce, the complaint is accordingly dismissed.

If the issues of custody, support, attorneys fees, etc., presently before the parties remain unresolved, leave is granted to either party to petition this court for assistance.

Settle judgment.

Dated: July 14, 1980

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At a Special and Trial  
Term of the Supreme  
Court of the State of  
New York, Part 12  
thereof, held in and for  
the County of New  
York at the Court-  
house, New York, New  
York, on the 30th day  
of Oct. 1980.

PRESENT: HON. FRANK BLANGIARDO, Justice

<hr/>		:	
MICHAEL ZWEIG,		:	
	Plaintiff,	:	INDEX NO.
		:	35892/79
-against-		:	
MARTHA ZWEIG,		:	
	Defendant.	:	JUDGMENT
		:	

(EXEMPLIFIED)

The above entitled action having been brought by plaintiff for a judgment of absolute divorce in favor of the plaintiff and against the defendant, dissolving the marriage existing between the parties upon the grounds of cruel and inhuman treatment of the plaintiff by the defendant, and abandonment, in addition thereto plaintiff having sought joint custody, attorney's fees, court costs and disbursements, and the defendant having been duly personally served within the State of New York with the summons and verified complaint, and the defendant having appeared by her attorney Gerald E. Paley, and having

answered denying the material allegations of the complaint, as well as setting forth affirmative defenses of the statute of limitations and failure to state a claim, and having sought custody of the infant child, support and maintenance, and attorney's fees, and the issues of fact raised by the pleadings having duly come on to be tried by the Supreme Court at a Special and Trial Term Part 12 thereof held by the Honorable Frank Blangiardo without a jury; and the plaintiff having appeared by Daniel L. Alterman, Esq., his attorney, and the defendant having appeared by Gerald E. Paley, Esq., her attorney, and the parties having been duly heard, and said Justice having rendered a written opinion dated July 14, 1980,

Now, on motion of Gerald E. Paley, attorney for the defendant it is,

Ordered, Adjudged and Decreed, that the plaintiff, Michael Zweig, be and he hereby is denied judgment of divorce dissolving the marriage relation between Michael Zweig, and Martha Zweig, defendant, by reason of plaintiff failing in the proof required to support his causes of action for divorce, and it is further,

Ordered, Adjudged, and Decreed, that if the issues of custody, support, attorneys' fees, etc., presently before the parties remain unresolved leave is granted to either party to petition this court for assistance.

ENTER

FILED OCT 31 1980

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. DOCKET NO. S98-87 CaF  
MICHAEL F. ZWEIG, Plaintiff

v.

MARTHA MACNEAL ZWEIG, Defendant pro se

MOTION TO DISMISS (Transcript) Excerpts:

February 17, 1988

(page 10, lines 3-6) MR. RUBIN: . . . It's a continuing cause of action, having been separated. And we have law to submit that, and when the briefs are written we'll provide that to the Court.

\* \* \*

(page 12, lines 3-9) THE COURT: . . . With respect to the pending motions, it appears to the Court that several issues that are not of a routine nature have been raised. And that under our motions practice rule it is appropriate that the parties be afforded an opportunity to develop the issues with appropriate filings of the law as they understand it.

\* \* \*

(page 13, lines 15-20) As to res judicata effect of a New York judgment based on New York law and its effect on a Vermont proceeding based on Vermont law, this Court won't opine on that today, but will direct the parties to submit your view of the law on that issue before decision.

\* \* \*

(page 14, lines 8-11) . . . however you raised that issue, you should address it with supporting law for the benefit of the Court who will be deciding the issue.

\* \* \*

(page 18, lines 8-10) . . . I can't give you a trial date because the outcome of the motions must be determined before that bridge is crossed.

\* \* \*

(page 25, line 2 – page 26, line 10) First, in addressing the concern of the Defendant that this not be deemed a rule 41 voluntary dismissal, the Court does not deem it to be such. It is not a motion to dismiss of the Plaintiff, but rather of the Defendant.

The Plaintiff has indicated concurrence in the ground set forth by the Defendant; that's not, in the Court's view, tantamount to a 41(a) voluntary dismissal.

Rule 80(b) in part provides as follows, quote: "The complaint shall also set forth whether any divorce, annulment, abuse prevention or separate support proceedings have been brought previously by either party against the other. If such proceedings have been brought in another court, there shall be filed with the complaint a certified copy of the complaint, libel or petition in such proceedings, together with a certified copy of the docket entries relative thereto." Close quote.

It's generally the rule of construction that "shall," when used in a rule or statute, is mandatory.

\* \* \*

It seems to the Court that the salutary purpose of the rule is to give notice, both to the Defendant and to the Court itself, of the nature of litigation elsewhere, and in particular this would avoid the unseemly prospect of inconsistent judgments issuing from two different courts with a resulting waste of time and uncertainty to the litigants as to where they might stand in the event of such an inconsistency.

\* \* \*

(page 26, lines 15-19) Accordingly, there appearing no appropriate reason for denying the motion on those particular grounds, the motion is granted. The action is dismissed without prejudice.

\* \* \*

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. DOCKET NO. 51-88 CaF  
MICHAEL F. ZWEIG, Plaintiff

v.

MARTHA MACNEAL ZWEIG, Defendant pro se

ENTRY REGARDING MOTION,  
filed September 27, 1988

Title of Motion: PETITION TO REOPEN HEARING, filed September 27, 1988. DENIED. "Court has fully considered def's position. It *wholly* lacks merit."

\* \* \*

ENTRY REGARDING MOTION, filed October 7, 1988



(Caption Omitted In Printing)

Title of motion: MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY RULING TO THE SUPREME COURT OF THE STATE OF VERMONT UNDER VRAP 5, filed October 3, 1988. DENIED. "Court considers defendant's issues insubstantial, unlikely to be successful on appeal, and unlikely to materially advance completion of this litigation. Supreme Court would prefer the clear and full factual record a trial will afford. Trial can be had this term. Defendant's rights to contest jurisdiction will not be compromised. They are preserved."

\* \* \*

IN THE SUPREME COURT OF THE  
STATE OF VERMONT

MICHAEL F. ZWEIG

v.

MARTHA MACNEAL  
ZWEIG

SUPREME COURT  
DOCKET NO.

88-481

APPEALED FROM:  
Caledonia Superior  
Court, Docket No.  
S51-88 CaF

ENTRY ORDER: "Defendant's motions for interlocutory appeal and stay pending appeal are denied." Filed November 29, 1988.

\* \* \*

(Caption Omitted In Printing)

ENTRY ORDER: "Defendant-appellant's motion for interlocutory appeal was denied by this Court on November 29, 1988 because no abuse of discretion was found on

the part of the trial court in its denial of permission for interlocutory appeal. *State v. McCann*, 149 Vt. 147, 151, 541 A.2d 75, 77 (1987)." Filed December 19, 1988.

\* \* \*

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. DOCKET NO. S51-88 CaF

ENTRY REGARDING MOTION, filed January 3, 1989

Title of Motion: MOTION FOR CONTINUANCE, filed  
January 3, 1989. DENIED.

\* \* \*

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STATE OF VERMONT  
Caledonia County, ss.:

SUPERIOR COURT  
Docket No. S51-88 CaC

MICHAEL F. ZWEIG

V.

MARTHA MACNEAL ZWEIG

] ] ] ] ]

FILED  
JAN 26 1989

ENTRY

The objections to the proposed decree of divorce have been reviewed by the court, are found to be lacking in substance, and are overruled.

Defendant's request to open a course of discovery at this time is denied. This matter was commenced in early 1988. Instead of making any effort to engage in discovery, defendant chose to focus all her efforts on an attempt to derail the divorce. When her motion to dismiss was denied, the court clearly instructed the clerk to set the

matter for trial in December, so defendant was on notice of her need to commence discovery. Of equal importance, is the apparent futility of discovery. There seems little dispute that the husband makes more than four times what the wife does, but that she has property while he does not. Although no extended discussion was engaged in regarding his pension rights, after a separation as long as this one, with a wife who has the ability to support herself, and no children at home, and comes from a family of some means, it seems beyond remote that the court would make an award against the husband. Entering upon discovery at this time would be at once burdensome, unfair and futile.

We have also reviewed defendant's request to amend the findings of fact. Although the court is required to make findings on all pertinent issues, we are not required to make findings on each sub-contention raised by a party. We feel the findings as they now exist serve to show the parties and the Supreme Court how the decision was reached.

We finally decline to stay the decree of divorce.

All motions DENIED.

Dated at St. Johnsbury, Vermont January 26, 1989.

/s/ Matthew I. Katz  
Matthew I Katz

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STATE OF VERMONT  
Caledonia County, ss.:

SUPERIOR COURT  
Docket No. S51-88 CaC

MICHAEL F. ZWEIG

V.

MARTHA MACNEAL ZWEIG

)  
)  
)  
)

FILED  
JAN 31 1989

### ENTRY

Defendant seeks the admission of certified copies of New York divorce proceedings, showing that plaintiff's efforts to obtain a divorce in that state were unsuccessful. At trial, the court admitted uncertified copies, without objection. It has at all times been admitted that plaintiff's efforts in New York were unsuccessful. At trial, defendant's final argument in favor of later admitting the certified copies is that she had already paid for them. As plaintiff has not objected to this post-trial motion to admit the certified copies, they are admitted. Of course, they do not change the result.

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SUPREME COURT DOCKET NO. 89-120

APRIL TERM, 1990

Michael F. Zweig

v.

Martha MacNeal Zweig

) APPEALED FROM:  
)  
) Caledonia Superior Court  
)  
) DOCKET NO. S51-88 CaF  
)  
) FILED JUL 8 1039 AM

In the above entitled cause the Clerk will enter:

Appellant's motion for stay of execution and for continued stay of the nisi period, for declaration of federal questions, and for a hearing on the motions are denied.

\* \* \*

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SUPREME COURT DOCKET NO. 89-120  
APRIL TERM, 1990

Michael F. Zweig	)	APPEALED FROM:
	)	
v.	)	Caledonia Superior Court
	)	
Martha MacNeal Zweig	)	DOCKET NO. S51-88 CaF
	)	
	)	FILED JUN 25 149 PM

In the above entitled cause the Clerk will enter:

Appellant's motion for reargument, filed June 15, 1990, fails to identify points of law or fact overlooked or misapprehended. The motion is therefore denied.

\* \* \*

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. DOCKET NO. S 51-88 CaF

MICHAEL F. ZWEIG	)	FILED
	)	JAN 26 1989
v.	)	
MARTHA MACNEAL ZWEIG	)	DIVORCE
	)	DECREE

This matter was heard on January 6, 1989. The plaintiff was present and represented by Richard I. Rubin,

Esquire. The defendant was present and represented herself. Based upon the evidence presented and the Findings of Fact, Conclusions of Law and Order issued by this court on January 9, 1989, it is hereby further ORDERED and DECREEED as follows:

1. Notice, marriage, and residence have been proved. A divorce is granted to the plaintiff upon the grounds that the parties have lived separate and apart for six (6) consecutive months and the resumption of marital relations is not reasonably probable. Decree nisi, shall become absolute on April 6, 1989.

2. The parties have long ago divided their real and personal property and each party shall retain ownership of the property now in his or her possession. Neither party shall pay maintenance to the other.

\* \* \*

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## **APPENDIX B – CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED**

This case involves application of Full Faith and Credit and due process to the conflicting judgments and statutes of New York and Vermont. The parties' New York stipulation involves impairment of contract. Vermont's amended statute on residence for divorce purposes, considered in the context of its statutory provisions for enforcement of maintenance decrees, involves equal protection of the laws. The relevant provisions, verbatim, are these:

### **CONSTITUTION OF THE UNITED STATES**

#### **ARTICLE I, § 10, paragraph 1:**

"No state shall . . . pass any . . . law impairing the obligation of contracts . . .

\* \* \*

ARTICLE IV § 1. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

§ 2. (paragraph 1) "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

\* \* \*

AMENDMENT V. "No person shall . . . be deprived of life, liberty, or property, without due process of law, . . .



\* \* \*

## AMENDMENT XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \*

## 28 § 1738, United States Code

**§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit**

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its

Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

\* \* \*

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**VERMONT STATUTES ANNOTATED**

\* \* \*

**Ch.3 CONSTRUCTION OF STATUTES T.1 § 213**

\* \* \*

**§ 213. Pending suits unaffected**

Acts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage.

\* \* \*

**§ 214. Effect of amendment or repeal**

(a) The amendment or repeal of an act or of a provision of the Vermont Statutes Annotated shall not revive an act or statutory provision which has been repealed.

(b) The amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section, shall not:

(1) Affect the operation of the act or provision prior to the effective date of the amendment or repeal thereof;

(2) Affect any right, privilege, obligation or liability acquired, accrued or incurred prior to the effective date of the amendment or repeal;

(3) Affect any violation of the act or provision amended or repealed, or any penalty or forfeiture incurred thereunder, prior to the effective date of the amendment or repeal;

(4) Affect any suit, remedy or proceeding to enforce or give effect to any right, privilege, obligation or liability acquired, incurred or accrued under the amendment or repealed provision prior to the effective date of the amendment or repeal; and the suit, remedy or proceeding may be instituted, prosecuted or continued as if the act or provision had not been repealed or amended.

\* \* \*

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Ch. 11      ANNULMENT AND DIVORCE T.15 § 551

*Subchapter 2. Divorce*

ARTICLE 1. GENERAL PROVISIONS

§ 551. Grounds for divorce from bond of matrimony

A divorce from the bond of matrimony may be decreed:

(1) For adultery in either party;

(2) When either party is sentenced to confinement at hard labor in the state prison in this state for life, or for three years or more, and is actually confined at the time of the bringing of the libel; or when either party being

without the state, receives a sentence for an equally long term of imprisonment by a competent court having jurisdiction as the result of a trial in any one of the other states of the United States, or in a federal court, or in any one of the territories, possessions or other courts subject to the jurisdiction of the United States, or in a foreign country granting a trial by jury, and is actually confined at the time of the bringing of the libel;

(3) For intolerable severity in either party;

(4) For wilful desertion or when either party has been absent for seven years and not heard of during that time;

(5) On complaint of either party when one spouse has sufficient pecuniary or physical ability to provide suitable maintenance for the other and, without cause, persistently refuses or neglects so to do;

(6) On the ground of incurable insanity of either party, as provided for in sections 631-637 of this title;

(7) When a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable.

\* \* \*

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**T.15 § 592 DOMESTIC RELATIONS****Ch. 11****§ 592. Resident**

A complaint for divorce or annulment of marriage may be brought if either party to the marriage has resided within the state for a period of six months or more, but a divorce shall not be decreed for any cause, unless the plaintiff or the defendant has resided in the state one year next preceding the date of final hearing. Temporary absence from the state because of illness, employment without the state, service as a member of the armed forces of the United States, or other legitimate and bona fide cause, shall not affect the six months' period or the one year period specified in the preceding sentence, provided the person has otherwise retained residence in this state. – Amended 1981, No. 2, eff. Feb. 12, 1981.

**Amendments – 1981.** Substituted "if either party to the marriage" for "by a person who" following "brought" and inserted "or the libelee" following "libelant" in the first sentence and deleted "his" preceding "residence" in the second sentence.

\* \* \*

**Ch. 11 ANNULMENT AND DIVORCE T.15 § 780***Subchapter 7. Wage Support Assignment***§ 780. Definitions**

As used in this chapter:

(1) "Issuing authority" means the entity which has jurisdiction over the underlying support order;

(2) "Petitioner" means the person found to be legally entitled to receive child or spousal support or any

person to whom the petitioner has assigned or authorized all rights of collection;

(3) "Respondent" means the person required to pay child or spousal support;

(4) "Support" means periodic payments ordered for the support of dependent children or a spouse; including periodic amounts to be applied toward unpaid arrearages;

(5) "Support order" means any judgment, order or contract for support enforceable in this state, including, but not limited to, orders issued pursuant to 15 V.S.A. chapters 5 (relating to desertion and support and parentage), 7 (relating to URESA), 11 (relating to annulment and divorce), 3 V.S.A. § 3092, or 33 V.S.A. §§ 2715, 2717 or 2726 (relating to human services board);

(6) "Wage assignment" means a transfer from the respondent to the petitioner of the right to receive a portion of the respondent's wages directly from the respondent's employer;

(7) "Wages" means any compensation paid or payable for personal services, whether designated as wages, salary, commission, bonuses or otherwise, and shall include periodic payments under pension or retirement programs, or insurance policies of any type.

\* \* \*

#### **§ 782. Wage assignment after issuance of support order; court procedure**

(a) A petitioner to whom a support order has been issued may request a wage assignment if the respondent's arrearages in connection with such order are

greater than one-twelfth of the respondent's annual support obligation. The petition brought under this section shall be made, in writing, to the court which has jurisdiction over the underlying support obligation.

\* \* \*

**§ 787. Employer's responsibility; compensation**

(a) Upon receipt of a copy of the wage assignment order and written notice of the petitioner's address, an employer shall:

(1) withhold from the wages paid to the respondent the periodic support amount specified in the order for the periods so specified;

(2) not less than once a month, forward the withheld wages to the petitioner;

(3) retain a record of all withheld wages;

(4) cease withholding wages upon notice from the issuing authority or petitioner; and

(5) notify the petitioner as soon as reasonably practicable if respondent's employment is terminated.

(b) In addition to the amounts withheld pursuant to this subchapter, the employer may retain not more than \$5.00 per month from the respondent's wages as compensation for administrative costs incurred.

(c) Any employer who fails to withhold wages pursuant to a wage assignment order shall be liable to the petitioner in the amount of the wages required to be withheld.



VERMONT RULES OF CIVIL AND  
APPELLATE PROCEDURE

RULES OF CIVIL PROCEDURE V.R.C.P. 80

(o) Support Wage Assignment.

(1) *Application of Civil Rules.* Except as provided in this subdivision or by statute, the Rules of Civil Procedure shall apply to actions seeking support wage assignment.

(2) *Petition; Notice of Rights.* A petition for support wage assignment pursuant to 15 V.S.A. § 780 et seq. shall set forth the name of the petitioner, and, if different, the name of the person legally entitled to receive child or spousal support, the respondent, the respondent's employer(s), if known, and such other information as required by law. A notice of rights under wage assignment shall set forth grounds on which the respondent may contest the petition and that, if this is the first time the petitioner has sought a wage assignment against the respondent, the respondent may avoid the assignment by making full payment to the petitioner of all support due and owing within 20 days of receiving the petition.

(3) *Service and Filing of Petition and Notice of Rights.* The petitioner shall serve a copy of the petition together with notice of rights and an objection form upon the respondent either (i) in accordance with Rule 4 or (ii) by registered or certified mail, return receipt requested with instructions to deliver to addressee only. The original petition and notice together with proof of service shall be filed with the court.

\* \* \*

**V.R.C.P. 80 RULES OF CIVIL PROCEDURE**

**Reporter's Notes – First 1985 Amendment**

\* \* \*

Paragraph (3) follows the statute in providing for alternative methods of service – service by mail or service by officer under Rule 4(c), (d), or (e). The statute is silent on the extent to which it is intended to reach a respondent who is out of state. Without personal jurisdiction over the employer, however, any order issued by the Vermont court could not be enforced. See 15 V.S.A. § 787.

**MC KINNEY'S CONSOLIDATED LAWS OF NEW YORK  
ANNOTATED:**

Book I, Statutes, Chapter 5:

**§ 52. Amendatory statutes**

Generally, an amendment will have prospective application only, and will have no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation.

\* \* \*

**§ 53. Statutes affecting rights or liabilities**

A statute generally will not be applied retroactively where it would deprive one of a substantial right, or affect antecedent rights.

\* \* \*

**§ 58. – Judgments**

A judgment, after it becomes final, may not be affected by subsequent legislation.

\* \* \*

Domestic Relations Law:

**§ 170. Action for divorce**

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Deviate sexual intercourse includes, but not limited to, sexual conduct as defined in subdivision two

of Section 130.00 and subdivision three of Section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree of judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names of addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

\* \* \*

## § 200. Action for separation

An action may be maintained by a husband or wife against the other party to the marriage to procure a

judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

2. The abandonment of the plaintiff by the defendant.

3. The neglect or refusal of the defendant-spouse to provide for the support of the plaintiff-spouse where the defendant-spouse is chargeable with such support under the provisions of section thirty-two of this chapter or of section four hundred twelve of the family court act.

4. The commission of an act of adultery by the defendant; except where such offense is committed by the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plaintiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce, provided that adultery for the purposes of this subdivision is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Deviate sexual intercourse includes, but not limited to,

sexual conduct as defined in subdivision two of Section 130.00 and subdivision three of Section 130.20 of the penal law.

5. The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

\* \* \*

### **Civil Practice Law and Rules:**

#### **§ 3017. Demand for relief**

(a) **Generally.** Except as otherwise provided in subdivision (c) of this section, every complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a demand for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded. Except as provided in section 3215, the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just.

\* \* \*

#### **RULE 4511. Judicial notice of law**

(a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

\* \* \*

**RULE 5013. Effect of judgment dismissing claim**

A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

\* \* \*

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**APPENDIX C - EXCERPTS FROM THE RECORDS  
BELOW, RELEVANT TO THE FEDERAL QUESTIONS**

\* \* \*

July 24, 1979  
(exemplified)

SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF NEW YORK

<hr/>		
MICHAEL ZWEIG,		
	Plaintiff,	AMENDED
		COMPLAINT
-against-		
MARTHA ZWEIG,		Index No.
	Defendant.	35892/79
<hr/>		

Plaintiff, by his attorneys, STOLAR ALTERMAN & GULIELMETTI, complaining of defendant, alleges as follows:

1. Plaintiff has been a resident of the County, City and State of New York for a continuous period of at least two (2) years prior to the commencement of this action.
2. Upon information and belief, defendant is a resident of Hardwick, Vermont.

\* \* \*

AS AND FOR A FIRST CAUSE OF ACTION  
PLAINTIFF RESPECTFULLY ALLEGES:

7. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "6" inclusive, with the same force and effect as if fully set forth at length herein.

\* \* \*

AS AND FOR A SECOND CAUSE OF ACTION  
PLAINTIFF RESPECTFULLY ALLEGES:

15. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1" through "14" inclusive, with the same force and effect as if fully set forth at length herein.

16. The defendant engaged in a course of conduct that seriously affected, impaired and threatened the plaintiff's well-being and rendered it unsafe and improper for him to continue to cohabit with the defendant. These actions and non-actions were not justified and were without the consent of the plaintiff and caused him to remove himself from the marital home to protect his mental health and emotional well-being.

\* \* \*

20. As a result of the defendant's unjustified behavior plaintiff regularly felt humiliated, depressed and ridiculed. In or about 1971 and continuing to April 1974, the plaintiff began to believe that it was he alone that was destroying the marriage . . .

\* \* \*

As a result of same he began to suffer physically while acquiring a nervous habit of biting his hands which caused lesions requiring subsequent medical attention. Upon his removal from the marital home these symptoms ceased to exist.

21. The treatment of plaintiff by defendant rendered it unsafe and improper for him to continue to cohabit with defendant. In April 1974 plaintiff to protect his mental and emotional well-being, vacated the marital residence.

22. Upon information and belief, during September - October 1974, the defendant removed herself and SIERRA from the State of New York to reside in the State of Vermont where she has resided ever since.

\* \* \*

WHEREFORE, it is respectfully requested that an Order be entered dissolving the marriage, . . .

\* \* \*

OCTOBER 2, 1979

Caption Omitted in Printing  
AMENDED VERIFIED ANSWER  
AND COUNTERCLAIM

Defendant MARTHA ZWEIG, by her attorney, GERALD E. PALEY, Esq., answering the amended complaint of plaintiff, alleges as follows:

1. Denies the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24 and 25 of the complaint herein.

2. Repeats and reiterates the replies to the allegations contained in paragraphs 1 through 4 of the complaint herein as realleged in paragraph 15 as hereinbefore set forth with the same force and effect as if set forth at length herein.

3. Denies the allegations contained in paragraph 22 of the complaint except admits that defendant and Sierra moved to Vermont and reside there.

\* \* \*

FOR A COUNTERCLAIM,  
DEFENDANT ALLEGES:

6. Repeats and realleges each and every allegation set forth in paragraphs numbered "1" through "6" of plaintiff's complaint with the same force and effect as if repeated and set forth at length herein.

\* \* \*

8. Commencing with a time early in 1973, and continuing up until the plaintiff physically left the defendant and their child, in May, 1974, and continuing thereafter up until the present time, the plaintiff has without any good or justifiable cause therefor, or without any provocation therefor, refused to have sexual intercourse with the defendant and plaintiff has thereby disavowed his marriage to the defendant and abandoned her.

\* \* \*

11. In or about May, 1974, plaintiff did willfully abandon defendant and their child and did leave the home maintained by the parties in New York, without

justification and without intention of returning and did state that he would not return and has failed and refused to return since that date and failed adequately to provide for the support, maintenance, and education of the child of their marriage, despite defendant's requests, and has failed and neglected to live with the defendant and their child of this marriage and to return to the defendant and their child who still continues to reside with the defendant, despite defendant's requests.

\* \* \*

WHEREFORE, defendant demands judgment:

a) Dismissing the complaint herein;

\* \* \*

December 3, 1980

#### NOTICE OF APPEAL

(Caption Omitted in Printing)

PLEASE TAKE NOTICE, that the above-named plaintiff, MICHAEL ZWEIG, hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Department, from the judgment of the Supreme Court, County of New York, in this action, entered in the office of the Clerk of said Court, at 60 Centre Street, New York, New York on the 31st day of October, 1980, and from each and every part thereof.

\* \* \*

DECEMBER 3, 1980

Caption Omitted in Printing

PRE-ARGUMENT STATEMENT

\* \* \*

4. Appeal from the judgment of Supreme Court of the State of New York, County of New York (Blangiardo, J.), Trial Term, Part 12, entered October 31, 1980.

• • •

8. Grounds for reversal are the Court's failure to consider psychiatric testimony regarding the cruelty grounds, the Court's failure to consider the dead marriage doctrine, and that the Court's findings were clearly erroneous on the facts and the law.

• • •

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. Civil Action No. S98-87 CaF

MICHAEL F. ZWEIG, ) FILED  
 ) JUL 31 1987  
 )  
 ) plaintiff )  
 )  
 ) v. ) Cecile M. Rainville  
 )  
 )  
 ) MARTHA MACNEAL ZWEIG, ) Complaint For  
 ) Divorce  
 )  
 ) defendant )

1. Plaintiff resides in the town of New York, county of New York, State of New York, and has resided in the State of New York continuously until the present day since \_\_\_\_ 19\_\_\_\_.

2. Defendant resides in the town of Hardwick, county of Caledonia, State of Vermont continuously to the present since September, 1974.

• • •

6. No action for divorce from the bonds of matrimony, divorce from bed and board, separate maintenance, or annulment has been brought by either party against the other, except:

Divorce action Index #35892-79

Supreme Court: New York County, State of New York

7. During the marriage the defendant has

- (d) lived separate and apart from plaintiff for six consecutive months, the resumption of marital relations being not reasonably probable.

WHEREFORE, plaintiff prays:

That the Court grant plaintiff a divorce from the bonds of matrimony (divorce from bed and board);

\* \* \*

---

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS CIVIL ACTION,  
DOCKET NUMBER S98-87 CaF

MICHAEL F. ZWEIG, Plaintiff

v.

MARTHA MACNEAL ZWEIG, Defendant pro se

ANSWER TO THE COMPLAINT, filed August 13, 1987

\* \* \*

#### SECOND AFFIRMATIVE DEFENSE

5. Res Judicata. Plaintiff's original suit for divorce, Divorce Action Index #35892-79, Supreme Court:



New York County, State of New York, brought by summons on December 21, 1978, and denied on July 14, 1980, argued "Dead Marriage" on the basis of plaintiff's then 6-year voluntary separation from defendant; plaintiff's firm declaration of no intent or possibility of resuming relations; and both parties' living with other partners, plaintiff for 5 years and defendant for 4 years, at that time. "Dead Marriage" was specifically denied, and the facts then argued are unchanged to the present. Defendant asserts that the present complaint alleges plaintiff's same claim and cause of action. Defendant will raise issues concerning the law of the state of New York.

Defendant asserts her right to the protection of Full Faith and Credit under Article 4, Section 1 of the Constitution of the United States, that the Court accord New York's decision against "Dead Marriage" the same credit as if it had been Vermont.

### THIRD AFFIRMATIVE DEFENSE

6. Estoppel by Judgment, Record, and Verdict, and Collateral Estoppel. Defendant realleges paragraph 5 above, and further asserts that the facts decided are unchanged even if the Court should find the present cause of action different from the earlier one. The issue is precluded by Vermont's concurrent jurisdiction, and no new matters have transpired subsequently.

\* \* \*

MOTION TO DISMISS (Transcript) – February 17, 1988:

(Caption Omitted in Printing)

\* \* \*

(page 3, line 5- page 4, line 22) MR. RUBIN: . . . This is an action for divorce which is contested by the – by Mrs. Zweig on legal grounds, and I believe on factual grounds. The factual grounds being that she has denied that the parties have irreconcilably separated, although she admits that they have been physically separated for thirteen years and both live with other people.

There is a – and I don't think this is in dispute – there was a New York divorce action filed. And the issue of – the grounds for the divorce were severed from the issues of support, alimony, and separate, and division of marital property. The Judge in New York denied the divorce.

The complaint was filed on the basis of constructive abandonment and mental cruelty, there being no fault divorce in New York absent a separation agreement, which there was not in this case. So Mrs. Zweig's – some of her legal claims are based on an argument that there's a res judicata effect of the New York divorce, that there is some collateral estoppel arising out of that New York situation.

\* \* \*

(page 4, line 11-19): . . . We think, essentially, the only issue here is whether or not the parties should be divorced . . .

We would like to proceed with the factual question of whether they have been separated irreconcilably . . .

\* \* \*

(page 9, lines 1-20) THE DEFENDANT: . . . Although separation is not a ground for divorce in New York without a separation agreement, the doctrine of dead marriage has been used with the cruelty ground to cause divorce to be granted. Dead marriage was raised by Plaintiff in the New York case, was discussed, was specifically denied by Judge Blangiardo, and this was after six years of separation. And I believe it to be res judicata. If it is not, it is an estoppel as to fact, even though the cause of action is different under, I don't know, various items in my answer.

It would be nice not to have to go through all of that again. I'm sure we'll have to go through some of it. It must be very mysterious for the Court to wonder why a person would be doing this after thirteen years and what could it possibly be about. I want to be able to tell the Court as quickly and efficiently as possible, perhaps by the Court reading a transcript so that things don't have to be as long as they were in New York. It's absolutely essential.

\* \* \*

(page 10, lines 6-20) MR. RUBIN: . . . The fact is, if they have been separated for more than six months prior to the divorce action being filed, there is no estoppel or res judicata to what happened in New York.

First of all, what happened in New York was filed on the grounds of constructive abandonment and which was essentially sexual abandonment and mental cruelty. It

was denied on those grounds. There, there was no allegation of separate and apart necessary, if you will. And even if there were, there is no law that we are aware of, certainly not in Vermont, that would estop a divorce eight years later.

There is nine days of transcript – somewhere in the – untranscribed – somewhere in the bowels of the New York court system.

\* \* \*

(page 11, lines 16-23) My client has been living with another woman for thirteen years, Mrs. Zweig has been living with another man for almost ten years, six years I think, five or six years continuously, and they have been living in separate states. I think that – and that's not disputed factually. I think that's enough to establish a divorce in this state.

\* \* \*

STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS. Civil Action No. S51-88 CaF

MICHAEL E. ZWEIG,	)	FILED APR 5 1988
	)	
Plaintiff	)	Cecile M. Rainville
	)	
v.	)	Complaint For
	)	Divorce
MARTHA MACNEAL ZWEIG,	)	
	)	
Defendant	)	

1. Plaintiff resides in the town of New York, county of New York, State of New York and has resided in the State of continuously until the present day, for at least 20 years.

2. Defendant resides in the town of Hardwick, county of Caledonia, State of Vermont continuously to the present since September, 1974.

\* \* \*

6. No action for divorce from the bonds of matrimony, divorce from bed and board, separate maintenance, or annulment has been brought by either party against the other, except:

Divorce Action Index No. 35892-79, Supreme Court: New York County, State of New York; and,

Docket No. S98-87 CaF, Superior Court: Caledonia County, State of Vermont.

7. During the marriage the defendant has

- (d) lived separate and apart from plaintiff for six consecutive months, the resumption of marital relations being not reasonably probable.

WHEREFORE, plaintiff prays:

That the Court grant plaintiff a divorce from the bonds of matrimony.

\* \* \*

MOTION TO DISMISS UNDER RULE 12(b), filed April 18, 1988

(Caption Omitted in Printing)

The "defendant" moves the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter under rule 12(b)(1), required by Chapter 2, section 28, of the Constitution of the State of Vermont, because:

a. From 1968-74 plaintiff and defendant lived together in Suffolk County, New York.

b. The separation alleged in paragraph 7 of plaintiff's complaint was initiated entirely by him, without the consent and against the will of defendant; it occurred in April of 1974 in Suffolk County, State of New York, and has been maintained by plaintiff thereafter as a resident of New York County, State of New York.

c. The separation alleged in paragraph 7 of plaintiff's complaint; plaintiff's initiation and maintenance of the separation, and defendant's later Vermont residence, were all alleged in 1980 as a cause of action in paragraphs 16, 21 and 22 of plaintiff's amended complaint in his previous suit for divorce against this defendant, Index # 35892-79, brought by him in the jurisdiction of the Supreme Court, New York County, State of New York. . . . All the issues were heard and determined to be without merit by Justice Blangiardo in that jurisdiction in July of 1980.

\* \* \*

d. Plaintiff's allegation in paragraph 7 of his complaint, that reconciliation is not reasonably probable, was likewise argued at trial before Justice Blangiardo in the New York jurisdiction, under plaintiff's assertion of New York's "dead marriage" doctrine.

\* \* \*

e. Plaintiff filed an appeal with the jurisdiction of the New York Court of Appeals in 1980, alleging error with regard to the "dead marriage" doctrine. . . .

\* \* \*

f. Plaintiff's allegations of separation and improbability of reconciliation had their proper jurisdiction in Supreme Court in New York, and were so pursued by plaintiff. Plaintiff's dispute with the



judgment of his New York suit had its proper jurisdiction in the Appellate Division of New York, and was so lodged by him and maintained subsequent to the apparent legal possibility of seeking Vermont jurisdiction. Vermont jurisdiction cannot now be invoked.

\* \* \*

MOTION TO AMEND MOTION TO DISMISS  
UNDER RULE 12 (b), filed June 1, 1988:

(Caption Omitted in Printing)

2. . . . d. There has been no interruption or change in the circumstances of separation since 2/12/81, the effective date of revision of VSA Title 15, sec. 592.

3. Proper jurisdiction of the subject matter, process, and persons of "plaintiff" and "defendant" belongs to New York by res judicata.

a. "Plaintiff" himself sought New York jurisdiction of the subject matter, process, and persons in December, 1978.

b. In July 1980, by stipulation of then plaintiff and defendant, the marital issues were severed from issues of custody and economics. The complaint for divorce was then heard and dismissed as without merit by Justice Blangiardo.

\* \* \*

c. Justice Blangiardo's opinion, not filed in this action by "plaintiff" as required by rule 80(b), specifically noted that then plaintiff had left then defendant "never to return", and denied divorce nevertheless.



d. Present "plaintiff's" New York appeal, which has not been filed in the present action as required by rule 80(b), was never perfected. "Plaintiff" never appealed New York jurisdiction, or the severance of the marital issues to be heard and decided independently of custody and economics in the New York jurisdiction, or the jurisdiction of Justice Blangiardo's denial of divorce in the found circumstance of plaintiff's intent "never to return."

\* \* \*

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS, filed June 2,  
1988:

(Caption Omitted In Printing)

\* \* \*

The plaintiff initiated a divorce action in New York state in 1979. He alleged as grounds both "cruel and inhuman treatment" and "constructive abandonment". After trial, the New York state court denied the divorce.

The plaintiff had no right to sue in Vermont courts under 15 V.S.A. 552 until 1981. In 1981, the statute was amended to permit the filing of a divorce action by a non-resident plaintiff against a resident defendant.

\* \* \*

. . . The defendant has resided in Vermont for fourteen years and 15 V.S.A. 592 authorizes the filing of this action. . . .

The United States Supreme Court has held that the domicile of one party to a divorce creates an adequate

relation in the state of that party's domicile to justify its exercise of power over the marital relation. *Johnson v. Muelberger*, 340 U.S. 581 at page 585, citing *Williams I*, 317 U.S. 287 and *Williams II*, 325 U.S. 226.

\* \* \*

... our Supreme Court citing *Pennoyer v. Neff*, 95 U.S. 714, reaffirmed the longstanding doctrine that a state has the absolute right to prescribe the conditions upon which the marriage relation shall be created and the causes for which it may be dissolved in those cases within its proper jurisdiction.

\* \* \*

The defendant has raised certain other matters in her Motion to Dismiss which are in the nature of affirmative defenses. Essentially, she asserts *res judicata* and estoppel on the grounds that the plaintiff alleged similar facts in the New York proceeding.

These matters are properly left for resolution after presentation of evidence at trial. However, the plaintiff wishes to make clear now that the asserted grounds for his New York divorce were cruelty and constructive abandonment, not an irreconcilable separation in excess of six months. And, even if the plaintiff did allege and fail to prove an irreconcilable separation in New York in 1980, he is not foreclosed from alleging and proving that such a separation has now, in 1988, existed for more than six months.

The grounds of irreconcilable separation are continuing and the court need only conclude that such a condition exists for the requisite statutory time period on the

date the matter is heard. *Bruce v. Bruce*, 339 SE.2d 855 (N. Cal., 1986); 27A C.J.S. Divorce S. 95-96.

\* \* \*

PLAINTIFF'S RESPONSE TO DEFENDANT'S  
AMENDED MOTION TO DISMISS, filed June 8, 1988:

(Caption Omitted In Printing)

\* \* \*

The requirement in Rule 80 that certified copies of the Complaint in prior actions be attached to the Complaint in the pending action is to provide notice to the court of any other divorce proceedings which might effect the pending action. For instance, if custody had been previously litigated in another jurisdiction that prior litigation could affect the jurisdiction of the court to determine custody issues in the pending matter. . . .

The plaintiff has alleged that he and his wife have lived separately and apart for more than six months with no probability of reconciliation. The plaintiff pointed out in his earlier memorandum that the grounds of irreconcilable separation are continuing and that the court need only conclude that such a condition exists for the necessary statutory time period from the date the matter is heard. *Bruce v. Bruce*, 339 So.2d 855 (N.C. 1986; 27A C.J.S. Divorce 95-96. The defendant's argument that Section 214 of Title 1 somehow forecloses this divorce action is without substance. In 1981, the legislature expanded the jurisdiction of Vermont courts to hear divorce actions by allowing non-resident plaintiffs to sue resident defendants in our courts.

\* \* \*

The defendant's claim that this action is barred by Res Judicata was discussed in the defendant's earlier memorandum. Res Judicata is properly raised as an affirmative defense, not in a Motion to Dismiss.

\* \* \*

MOTION TO DISMISS, (transcript), September 23, 1988, excerpts:

(Caption Omitted In Printing)

(page 3, line 16-page 4, line 2) THE COURT:  
... You never had an exclusive right to sue for divorce. You may have been the only who could bring the one in Vermont because you were the only resident, but Mr. Zweig had the right to bring suit for divorce in any state that had jurisdiction.

MS. ZWEIG: Yes: and he did so. He did so in the state of New York. I believe the complaint was filed in late -

THE COURT: I understand that he brought one and it was dismissed.

MS. ZWEIG: That's correct.

\* \* \*

(page 5, line 19-page 6, line 4): Ms. Zweig  
... because of the prior law, the Defendant has two vested rights at present: My own exclusive right to sue for a divorce in Vermont, and especially in the legal effect

of the findings and judgment in New York which dismissed Plaintiff's suit. The separation was a cause of action, and the irreconcilability of separation, as I believe Mr. Rubin states in his own motion, was raised at trial by Plaintiff, was ruled on as a matter of fact by Justice Blangiardo. Plaintiff put in an appeal on that matter, did not pursue it, and it has long since been dismissed.

\* \* \*

(page 7, line 23-page 8, line 1): Now, particularly with the previous judgment, which passed on separation and irreconcilable separation, for Vermont to take jurisdiction of the issue would very dramatically affect the - my legally existing rights.

\* \* \*

(page 9, lines 7-11) THE COURT: You had your trial before Justice Blangiardo, B-l-a-n-g-i-a-r-d-o.

MS. ZWEIG: That's correct.

THE COURT: And he denied Mr. Zweig a divorce.

MS. ZWEIG: That's correct.

\* \* \*

(page 10, line 8-page 11, line 5) MR. RUBIN: Yes. I also would point out for clarification that the divorce was not the issue of irreconcilable difference or its equivalent in New York and was not pleaded or decided in the trial court.

THE COURT: Well. I'm not sure I think that's germane. Go ahead.

MS. ZWEIG: It was pleaded, and it was decided, as would be evident, to the court if the judgment and findings had been submitted as I believe they were supposed to be by Plaintiff. There's some laches in this in that I can't prove by a transcript that Plaintiff introduced the matter of irreconcilable separation and dead marriage, because the transcript was destroyed some years ago, and I have a letter to that effect from the court, if the Court wishes to see it.

THE COURT: Well, I'm not sure I understand how that's relevant.

MS. ZWEIG: Well. Okay. I will get to it. Sorry. So the *Carpenter* case says that amendment and repeals to statute may not be used to change the legal effect of prior actions And granting Plaintiff's right to sue in Vermont now would dramatically change the legal effect of the dismissal in New York. . . .

\* \* \*

(page 11, lines 19-23) MS. ZWEIG: Okay. Judge Meaker, when he dismissed S-98-87 Caf in February, ruled explicitly that these docket entries had to be in for the purpose that the salutary effect of the rule is to prevent inconsistent judgments.

\* \* \*

(page 12, line 18-page 16, line 1) Ms. Zweig: . . . I should tell you that I do have myself my copies of the opinion, findings, judgment, the appeal, notice of appeal, and the preargument statement, and whatnot; but they're not certified as they need to be for me to frame a responsive pleading, and I believe that the certification and

presentation of them is Plaintiff's burden; but I can, with the Court's permission, if the Court would like, show them as an offer of proof.

THE COURT: Well, I just don't understand why that's relevant. I think I know why Vermont rules require that there be the pleadings and docket entries from prior actions. I think it's important for this Court to know whether a divorce was granted, because we shouldn't divorce people are who are no longer married.

It is important for us to know if there was a custody award, because we shouldn't make an inconsistent award unknowingly. It's important for us to know if there was a child support award for the same reason. But none of that seems to be in issue over here.

There's no dispute but that Justice Gabel's second decision makes clear whatever accrues to that, there has never been a divorce in New York. . . .

So what difference would it make if there were a more legible docket entry or the opinion of Justice Blangiardo certified?

MS. ZWEIG: There would be a great difference. I could then show that the issue of dead marriage, as it was called in New York was specifically tried and decided and found as a fact against the Plaintiff, after he had left us for six years already, facts much more stringent than Vermont requires.

THE COURT: The reason that you have just stated, that that will make it - it's a more stringent test, the fact that Vermont requires dead marriage issue, is not relevant.



MS. ZWEIG: I believe it is relevant, your Honor. The no-fault statute in Vermont that asks for the possibility of reconciliation to be -

THE COURT: But Judge Blangiardo's decision, a New York decision, was in 1981.

MS. ZWEIG: That's correct.

THE COURT: And the Plaintiff must prove here, not that there was no possible reconciliation in 1981, but that there's no possible reconciliation in 1988 or 1989, whenever the trial is held in this court.

MS. ZWEIG: Yes. That is the continuousness argument; and - well, I'll move on a little bit to that. On Mr. Rubin's theory of continuousness and the no-fault statute, it's either the case that a no-fault divorce cannot be denied at all, in which case it becomes an irrebuttable presumption; or it's the case that if it is denied, the judgment has no finality.

It's very important for judgments which are not appealed in the court where they were rendered to be final; otherwise, if the Court exercised what is supposed to be its power to deny a no-fault divorce in theory sometimes, then an unsuccessful plaintiff could bring it back again six months later, six months after that; or if he was arguing a prospective six months, as apparently he's permitted to do, could bring it back the very next day. This would be absurd and chaotic and would completely destroy defendant's rights in a judgment.

THE COURT: Well, a New York judgment is final. It's a final determination that as of the date of its issuance the Plaintiff had not proven grounds under New York law

for divorce. That's final. What it does not do is go on from there and say: Having had one chance, the Plaintiff may never again seek a divorce. There is no law that supports such a contention, which is really the bottom line of your argument.

MS. ZWEIG: What there is in Justice Blangiardo's findings – findings of fact, now, not findings of law – it states that the Plaintiff left the Defendant never to return, and it finds as a matter of fact that there was no dead marriage. Those findings have to be given very serious considerations under the Constitution and full faith and credit, which is something that I will argue later on as an affirmative defense, if I have to.

\* \* \*

(page 19, lines 7-23): THE COURT: All right. What's your argument with regard to jurisdiction, the first subject matter?

MS. ZWEIG: I'm kind of scattered here. I don't believe that the Vermont court has the authority to take jurisdiction over this matter, because the jurisdiction over this matter has already been exercised by the State of New York at Plaintiff's initiative and due to the statutory provisions of Vermont at the time.

Mr. Rubin has submitted the case of *Davidson v. Helm*, 63 South (2d) 866 showing that the residency of plaintiff is not necessary for jurisdiction, but that was was an original case. There had not been a previous judgment, and the Louisiana Supreme Court in that case confirmed that jurisdiction in the defendant's state, because it was also the state where the parties had lived together. In the

case of *Zweig* that state is New York, which is indeed where Plaintiff went.

\* \* \*

(page 20, line 9-page 21, line 15) THE COURT: So it is your contention that this Court has no subject matter jurisdiction because having once exercised it, New York retains it?

MS. ZWEIG: Well, that the judgment in New York is final. I don't want to waive my right to present an affirmative defense of *res judicata*. What I'm really saying is that the Plaintiff elected the jurisdiction of New York. He did so. And I spent 27 thousand dollars and went through a great deal on the basis of the Vermont law at the time, which did not permit Plaintiff to sue for divorce in Vermont. There's a legal effect to that plus an enormous cost in equity, . . .

. . . Personal jurisdiction was had of me in New York by service in the state of New York. New York jurisdiction has never been contested by the Plaintiff, who had an opportunity to do so when he appealed and did not. If he had prevailed in the New York action, I would not have recourse to Vermont jurisdiction. And it's inequitable that he should have resort to Vermont jurisdiction.

I have some citations from *Corpus Juris Secundum* and *American Jurisprudence* to the effect that jurisdiction does not depend on whether a plaintiff is successful or not, and that unsuccessful plaintiffs are not permitted to shop around for other jurisdictions. Well, here's 28 Am.J. -

THE COURT: But that is after a plaintiff has lost the suit; it cannot maintain that that loss was defective because there was no jurisdiction over the plaintiff.

MS. ZWEIG: Correct.

\* \* \*

(page 22, line 12,-page 23, line 25) MS. ZWEIG: One of the real major problems with personal jurisdiction is the equal protection of the law under the no-fault statute. In various cases it has been held constitutional to a divorce defendant who is not at fault, because the defendant not at fault can receive alimony, and the merits of the defendant's case, the fault of the parties, the merits of the parties can be resolved in alimony. That is not the case in this case because Vermont has no jurisdiction to enforce any alimony in the State of New York. Um. -

THE COURT: Well, the Plaintiff has subjected himself to the personal jurisdiction of this court, and if an alimony order were to be entered, it could be sued on and effectuated in New York under the full faith and credit clause.

MS. ZWEIG: I don't believe so. *Carothers v. Vogeler*, 148 Vermont 316, talks about "unenforceable foreign judgments," and it's somewhere in the law. If I could just look for a minute in the divorce law in one of the Reporter's Notes: could I take a moment, please?

THE COURT: (Nodded head affirmatively.)

MS. ZWEIG: Yeah. It's the Reporter's Note to V.R.C.P. 80, 1985 amendment, and I'm quoting it: The statute is silent on the extent to which it is intended to reach a respondent who is out of state without personal

jurisdiction over the employer; however, any order issued by the Vermont court could not be enforced. Now, -

THE COURT: Now, that's talking about a wage garnishment.

MS. ZWEIG: That's correct.

THE COURT: With an out of state employer.

MS. ZWEIG: That's correct. Plaintiff does not have any property in the State of Vermont or anything that could be attached, so that remedy at law is not available to me. The only consideration of merit which is available to me is to dismiss the case; and then I at least have the merit that it was demanded in New York.

THE COURT: And alimony is available to you in this action.

\* \* \*

(page 25, line 17-page 26, line 9) THE COURT: . . . We're going to deny the Motion to Dismiss. First of all, I do not feel the Defendant has or ever had an exclusive right to sue for divorce. Anybody, any party to a marriage, has the right to seek a divorce if that person can obtain jurisdiction over the defendant, and if that person can prove grounds. And the enactment of the new jurisdiction statute in 1981 that permits an absent spouse to sue a Vermont resident in Vermont courts for divorce does not abrogate any preexisting exclusive right to sue because there never was such a right in the first place.

The fact that there was a 1981 New York Supreme Court decision showing that the husband did not have ground for divorce under New York law is not preclusive

of his later attempting to show that he may have ground in Vermont under Vermont law. This Court has subject matter jurisdiction because one of the spouses appears to be and is asserted to be a permanent resident of this state.

\* \* \*

(page 26, line 25-page 27, line 16): . . . And to the extent that there are any gripes . . . with the certification . . . that's immaterial.

There is sufficient compliance with the rule. There is substantial compliance with the rule, because on the basis of these documents, it can be reasonably inferred that, in fact, these parties are still married, and that this is not a situation where the Plaintiff is trying to shove under the rug whatever happened at a prior action.

The Plaintiff is being candid in disclosing that there was a prior action and its substance. That, of course, does not prevent the Defendant from pursuing an affirmative defense of issue preclusion or claimed preclusion as she may see fit and using whatever proof she may muster.

\* \* \*

(page 32, line 3-page 34, line 9): THE COURT:  
. . . When are you going to be ready for trial?

MS. ZWEIG: I will be filing affirmative defenses, and I will be moving that the affirmative defenses be heard first, because I believe that they're dispositive, so I don't expect to be ready for trial on the merits.

THE COURT: Given the fact that the Plaintiff's proof on his whole claim for divorce probably will take something under a half hour to prove, why should we



bifurcate the hearing and hear the affirmative defenses first?

MS. ZWEIG: Because I believe that they are dispositive . . .

THE COURT: Well, in order to try your affirmative defenses, you're going to have to have your evidence ready, and when do you think that will be?

MS. ZWEIG: Well, I have already written to the New York court and to the legal support papers committee. I have copies of my letters and certification of certified mail that I sent them. They just don't answer. I have been asking for these papers.

THE COURT: Is it a question of authenticating Judge Blangiardo's decision?

MS. ZWEIG: It's a question of being able to prepare res judicata defense when it's clear from the law and from various cases that there has to be certification adequate to the enabling statute of the Federal Constitution.

THE COURT: Well, I think that Mr. Rubin is going to stipulate to the authenticity of your copy of Justice Blangiardo's decision.

MS. ZWEIG: Well, once again jurisdiction can't be had by consent or stipulation.

THE COURT: It's only a jurisdictional issue. Am I correct, Mr. Rubin, that you will stipulate to its authenticity?

MR. RUBIN: Yes; we have. Mrs. Zweig has a copy of it as well. Blangiardo's decision with his one line where



he says: The issue of dead marriage was raised, and I find there's no dead marriage. That's essentially one sentence. That's what she's interested in establishing.

THE COURT: Well, you don't contest that, do you?

MR. RUBIN: Contest that he said that?

THE COURT: Wrote that in his decision.

MR. RUBIN: No. We don't contest that. There are no transcripts. We got the same letter. Transcripts have been – they don't keep them after seven years or something. And that's the only paper that I'm aware of that she needs. It's been 14 or 15 months. She already filed one set of affirmative defenses in the previous action, and –

THE COURT: Well, I want to direct the clerk to set this for trial in November.

\* \* \*

PETITION TO REOPEN HEARING, filed September 27, 1988:

(Caption Omitted In Printing)

\* \* \*

B. Defendant was not permitted to comment on many of the authorities cited by Plaintiff's attorney, most of which she is prepared to show favor defendant's view, or are irrelevant. These include: *Johnson v. Muelberger*, 340 US 581; *Williams v. North Carolina*, 317 US 287 and 325 US 226; *Davidson v. Helm*, 63 Se.2d 866; *Place v. Place*, 129 Vt. 326; *Bruce v. Bruce*, 339 SE 2d 855; CJS Divorce 100, and 24 AmJ 2d 257 (which defendant believes was intended rather than 258).

\* \* \*

D. The constitutionality of statutes, including those relied upon to show Vermont jurisdiction in this matter, must be judged by their operation and effect as applied in particular cases. . . . *Airway Corporation v. Day*, 266 US 71.

\* \* \*

G. The jurisdiction of New York over the issues of separation and irreconcilable separation is vested in New York, . . . It is exclusive: *Pennyer v. Neff*, 95 US 714 (cited by Plaintiff); . . . It is proper as the state where both spouses last lived together, CJS Divorce 100 (cited by Plaintiff); 24 AmJ 2d 259. Plaintiff did not appeal the jurisdiction of New York, and no defect in that jurisdiction appears on the record or has been otherwise shown. 27A CJS 256; *Cook v. Cook*, 116 Vt. 374, 342 US 126, and 117 Vt. 173; . . .

M. To establish the jurisdiction of a second state, Plaintiff has the burden of showing the second state's superior interest in the matter, *Williams v. North Carolina*, 317 US 287 (cited by Plaintiff). However, it is New York's interest which is clearly superior, in the maintenance of jurisdiction already exercised over its resident under its own law, . . . Vermont's interest likewise favors the New York jurisdiction, . . . in avoiding the Constitutional problem of due process under the 14th Amendment of the US Constitution of entertaining divorce without regard to merits when equity in an alimony award cannot be enforced. The New York jurisdiction is therefore controlling because of priority, 20 AmJ2d 128; *Alaska Packers' Association v. Industrial Accident Commission of California et al*, 294 US 532.

\* \* \*

J. The unappealed jurisdiction of New York, a part of the New York judgment acknowledged by Plaintiff, grows stronger, not weaker, with time. 46 AmJ 2d 45; 46 AmJ 2d 32, citing *Shaver v. Shaver*, 102 SE 2d 791.

K. Divorce, if granted by Vermont in the present case, would be jurisdictionally limited to defendant's status and thus void in New York for Plaintiff, where his proposed "remarriage" would be bigamous, 21 CJS 544, citing Conflict of Laws sec. 14 (b); *Penneyer v. Neff*, 95 US 714 (cited by Plaintiff); . . . *Williams v. North Carolina*, 325 US 226 (cited by Plaintiff); . . . *Andrews v. Andrews*, 188 US 14; . . .

\* \* \*

### III.

H. New York jurisdiction over the issues of separation and "irreconcilable separation" is not voided because divorce was denied, any more than it would be if divorce had been granted. 21 CJS 15(a) p. 29; 50 CJS Jurisdiction, p. 1091; 28 AmJ 2d 73 and footnote citing *Hunt v. Hunt*, 72 NY 217.

\* \* \*

J. Plaintiff's choice of the New York jurisdiction for trial of the acknowledged issue of "irreconcilable separation", not appealed, is not to be relieved from. *In re Norris Trust*, 143 Vt. 325; 28 AmJ 2d 73 and footnote citing *Pease v. Rathbun-Jones Engineering Corporation*, 243 US 273.

K. Personal service upon the defendant in New York, and her appearance there, gave conclusive jurisdiction over her. . . .

L. In the New York action, the parties stipulated severance of the economic issues from the marital issues, Justice Blangiardo granting leave to petition *that court* regarding economics and custody. By the stipulation, and by prevailing upon the marital issues, defendant lost the possibility of an award of alimony, which equitable possibility cannot enforceably be restored in Vermont's jurisdiction. Plaintiff took advantage of the stipulation to delay adequate child support for 7 years, and to minimize it. . . .

Plaintiff, having relied on the New York stipulation to his advantage and the detriment of defendant and their daughter, cannot now maintain that New York's unappealed jurisdiction over the marital issues, of which that stipulation was a part, is an excess of New York's jurisdictional power. . . .

\* \* \*

M. The constitutionality of "no-fault" divorce rests upon the jurisdiction of the Court to express and enforce merits through alimony, *Ryan v. Ryan*, 277 So. 2d 266.

N. The inability of the Vermont jurisdiction to enforce equitable alimony upon the merits in favor of a Vermont resident who happens to be sued for divorce in Vermont on "no-fault" grounds by an out-of-state resident Plaintiff, necessarily creates an unconstitutional discrimination among Vermont resident "no-fault" defendants, since only those with Vermont resident

spouses and/or Vermont employers of these spouses can benefit from the merit equity provision. Such discrimination serves no state purpose, is arbitrary, and renders Vermont's jurisdiction in entertaining the present action violative of due process under the 14th Amendment of the US Constitution: 15 VSA 751 and 787; . . . *Williams et al. v. Vermont, et al.*, 472 US 14; . . . *Louisville Gas & Electric Company v. Coleman, Auditor*, 277 US 32; *Airway Corporation v. Day*, 266 US 71; *Royster Guano Company v. Virginia*, 253 US 412; . . .

\* \* \*

MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY RULING TO THE SUPREME COURT OF THE STATE OF VERMONT UNDER V.R.A.P. 5, filed October 3, 1988:

(Caption Omitted In Printing)

\* \* \*

2. Whether, under Articles 4, 9 and 18 and Chapter 2, section 71 of the Vermont Constitution, Amendment 14 of the United States Constitution, and VRCP 80, the extension of Vermont jurisdiction to non-resident plaintiffs to bring suit for divorce on no-fault grounds creates an arbitrary and discriminatory sub-classification among Vermont resident defendants, such that those with Vermont resident spouses have remedy available to them upon the merits, through alimony enforceable upon the spouses' Vermont employers, whereas these with spouses residing and employed out-of-state do not? Decision favoring the appellant will conclude this action.

*Ryan v. Ryan*, 277 So. 2d 266, found that no-fault divorce could meet the test of due process and equal

protection only through its economic provisions upon the merits. Vermont attempts to meet this condition through 15 VSA 751 and 787. But VRCP 4(e) and the reporter's note to VRCP 80 (1985 Amendment) declare these provisions unenforceable upon an out-of-state resident without property in Vermont, . . . discrimination in operation and effect has been repudiated in . . . *Williams et al. v. Vermont et al*, 472 US 14. Similar US Supreme Court cases include *Louisville Gas & Electric c. v. Coleman, Auditor*, 277 US 32; *Airway Corp. v. Day*, 266 US 71, and *Royster Guano Co. v. Virginia*, 253 US 412.

\* \* \*

However it may be resolved, *Schlesinger v. Wisconsin*, 270 US 230, holds firmly that "the state is forbidden to deny due process of the law or the equal protection of the laws for any purpose whatsoever."

\* \* \*

Plaintiff successfully chose and established the jurisdiction of New York, and his choice is not to be relieved from, . . . New York has prior interest and superior interest in its jurisdiction over its own citizen, *Alaska Packers Association v. Industrial Accident Commission of California, at al*, 294 US 532. . . .

\* \* \*

The five questions of law presented above are controlling in that the lower Court's denial of defendant's Motion to Dismiss, if it stands, will require lengthy trial and probably appeal of merits and affirmative defenses, with further Constitutional issues of Full Faith and Credit and res judicata to be raised.

\* \* \*

STATE OF VERMONT  
VERMONT SUPREME COURT

MICHAEL F. ZWEIG,

Plaintiff-Appellee

v.

MARTHA MACNEAL ZWEIG,

Defendant-Appellant

SUPREME

COURT

NO. 88-481

NOTICE OF CONSTITUTIONAL ISSUES, filed October 13, 1988

Defendant-appellant petitioner notices the Court of the existence of issues of equal protection, due process, and right to remedy at law, under the 14th Amendment of the Constitution of the United States . . . cited in her PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL TO THE VERMONT SUPREME COURT. . . .

\* \* \*

PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL TO THE VERMONT SUPREME COURT . . . filed October 13, 1988:

(Caption Omitted In Printing)

\* \* \*

(The passages excerpted above from the MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY RULING TO THE SUPREME COURT OF THE STATE OF VERMONT UNDER V.R.A.P. 5, submitted to and denied by the Caledonia Superior Court in S51-88, are repeated in this PETITION at pages 5-6, Question 2, page 9, paragraph 2, and page 10, paragraph 2.)

\* \* \*



STATE OF VERMONT CALEDONIA SUPERIOR COURT  
CALEDONIA COUNTY, SS CIVIL ACTION, DOCKET  
NUMBER S51-88 CaF

MICHAEL F. ZWEIG, Plaintiff

v.

MARTHA MACNEAL ZWEIG, Defendant pro se

ANSWER TO THE COMPLAINT, filed December 9,  
1988

\* \* \*

1. The defendant admits the allegations contained in paragraphs 2, 3, 4, and 6 of the complaint.

2. With regard to paragraph 1 of the complaint, defendant admits that plaintiff lived in the State of New York continuously from 1967 until April or May of 1974, and, upon information belief, that plaintiff has lived in New York City continuously to the present since April or May of 1974, when he deserted defendant, their daughter, and the martial home in Mt. Sinai, New York.

3. The defendant denies the allegations contained in paragraphs 5 and 7 of the complaint.

4. Defendant pleads the following affirmative defenses, and requests that they be heard prior to hearing upon the merits: ILLEGALITY, WAIVER, FRAUD, LACHES, INSUFFICIENCY OF PROCESS, STATUTE OF LIMITATIONS, LACK OF JURISDICTION, RES JUDICATA, ESTOPPEL, DESERTION and FAILURE TO STATE A CLAIM OR CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED.

\* \* \*

5. . . .b. 1 VSA 214(b) prohibits any effect of 15 VSA 592 upon the FINDINGS and JUDGMENT in New York Divorce Action Index #35892-79, attached, which defendant now submits, certification applied for as shown in the attached AFFIDAVIT IN SUPPORT OF ANSWER.

6. Defendant reiterates and reserves her contentions in her MOTION TO DISMISS and her MOTION TO APPEAL INTERLOCUTORY RULING, that plaintiff's suit is illegal under the Constitutions of the United States and the State of Vermont.

7. Plaintiff's suit violates New York's Domestic Relations Law 170 (6), attached, which authorizes "no-fault" divorce one year after filing a written separation agreement, signed by both parties. Since states have exclusive power over the marital status of their own citizens, Vermont owes comity to this law.

8. Plaintiff's suit violates the law of the case as finally determined in New York.

9. Plaintiff states in his MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS that he seeks remarriage, which would be bigamous under New York law by virtue of *Williams et al v. North Carolina*, 325 US 226.

\* \* \*

#### SECOND AFFIRMATIVE DEFENSE: WAIVER

10. Plaintiff has waived his Vermont cause of action by entering it in his broadened pleadings in New York, as

shown in Justice Blangiardo's FINDINGS, page 2, paragraph 5, and page 5, paragraph 1, and in plaintiff's New York NOTICE OF APPEAL AND PRE-ARGUMENT STATEMENT, attached, certification applied for as attested in defendant's attached AFFIDAVIT. Plaintiff's original pleadings allege the "separation" as a first and second cause of action, Verified Complaint paragraphs 1, 2, 8, 13 and 16, and Amended Complaint paragraphs 7, 15, 21 and 22. His appeal was accepted by the Appellate Division on 12/9/80 as shown in the New York list of docket entries, but plaintiff never pursued it.

11. Plaintiff has waived Vermont jurisdiction over his cause of action by successfully invoking New York's, as shown in the recitations in the New York JUDGMENT. Plaintiff successfully completed personal service of his New York summons and complaint upon defendant in New York City in December, 1978.

12. Plaintiff has further waived Vermont jurisdiction by utilizing 7 years of stipulated New York jurisdiction to delay and minimize child support. . . .

\* \* \*

15. Plaintiff has waived Vermont jurisdiction over "no-fault" separation and divorce by presenting defendant with a written separation agreement in May, 1974, in New York, prepared by his then attorney Jeremiah Gutman, and of the type prescribed by New York's Domestic Relations Law, section 170 (6), attached, and by testifying to this fact at trial in New York, and by asserting there as well that the parties' property division, other financial

arrangements, and defendant's move to Vermont constituted a separation agreement despite the fact that defendant declined to sign and continued to protest.

\* \* \*

18. Plaintiff attempts a fraud upon the laws and jurisdiction of New York, by seeking here to evade its JUDGMENT and the requirements of its "no-fault" divorce law.

#### FOURTH AFFIRMATIVE DEFENSE: LACHES

19. Plaintiff's "separation" is almost 15 years old; it was 6 years old when tried and decided in New York, and is 8 years old since the 1981 revision of 15 VSA 592 on which he relies.

20. The transcript record of the New York trial, which lasted at least 7 days, has been destroyed, as attested in the attached letter from Morris Lorber, Principal Court Reporter, Supreme Court of the State of New York, 7/29/88. Defendant is severely prejudiced in maintenance of her res judicata and estoppel defenses, in that at least the following matters were heard fully at trial, though they are not enumerated in the OPINION and JUDGMENT:

a. Presentation of the separation agreement, and defendant's refusal to sign, with plaintiff's attempts to imply such agreement from other matters, here reiterated from paragraph 15 above;

b. Justice Blangiardo explicitly asked plaintiff at trial in New York if he might wish to sue for separation

instead of for divorce, and plaintiff explicitly declined to do so;

c. Political purge against defendant by the self-styled "Communist" Revolutionary Union. Defendant reiterates section 2(h) of her MOTION TO DISMISS;

d. Plaintiff's refusal of marital counselling;

e. Plaintiff's relationship with Kathy Chamberlain, his present companion, and his wish to marry her. Plaintiff told defendant they were living together in spring of 1975, and in late 1975 or early 1976 that he wanted to marry her;

f. Defendant's relationship with Peter Buknatski, her present companion, which began in summer of 1976 and has never been concealed. Defendant introduced Plaintiff to Peter at her trailer in Hardwick soon thereafter;

g. Innumerable other matters which may or may not come up in this action, comprising everything relevant that was known by either party in July, 1980.

21. By filing appeal in New York, plaintiff incurred the burden to provide a transcript of the trial if he disputed the decision. By not pursuing his appeal, plaintiff rejected that burden. By his delay all this time, with destruction of the record, plaintiff has rendered the record irrecoverable.

**SEVENTH AFFIRMATIVE DEFENSE:  
LACK OF JURISDICTION**

30. Defendant realleges and reserves the jurisdictional objections made in her AMENDED MOTION TO DISMISS and her MOTION FOR PERMISSION TO APPEAL INTERLOCUTORY RULING.

\* \* \*

32. Each State has the absolute right to determine the conditions governing the marital status of its citizens, as plaintiff has pointed out in his MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, page 3, paragraph 2. The State in point, however, is New York. Plaintiff seeks Vermont divorce jurisdiction only for the cynical purpose of evasion of the laws and judgment of his own state, to which he will then return. Having successfully accomplished New York jurisdiction upon defendant by personal service there, he cannot now unaccomplish it for himself.

33. The principle of priority squarely affirms the New York jurisdiction, 20 AmJ 2d 128. Even under 15 VSA 592 amended, Vermont may extend its divorce jurisdiction to out-of-state residents only in an original action, not where judgment has already been rendered and may be altered in its effect.

\* \* \*

34. New York jurisdiction

- a. does not depend on merits or upon a good cause of action in plaintiff;
- b. does not depend on fault or no fault;



- c. cannot be questioned because divorce was denied, 24 Am.J 2d 426;
- d. cannot be questioned collaterally even if the New York Court decided erroneously, 50 CJS p. 1091;
- e. does not depend on which state's divorce policy is preferable.

35. New York jurisdiction is presumed unless lack of jurisdiction appears affirmatively on the face of the record, and whether or not res judicata applies, 65 HLR p. 855. The recitals in the New York JUDGMENT, attached, "impart absolute verity," 24 Am.J 2d 503, and are conclusive, especially after a long period of time, 27A CJS 260.

36. The fact of New York jurisdiction is itself res judicata, 24 Am.J 2d 1112 and 1125, because the parties appeared there and had opportunity to question jurisdiction, and because plaintiff filed his New York appeal on grounds not including jurisdiction, and then dropped appeal altogether.

37. The interest of the State of New York in this matter is superior to the interest of Vermont. New York has a judgment to protect, as well as the force of its law duly enacted, over its own resident. Since plaintiff contemplates remarriage, New York has an additional interest in the prevention of bigamy. *Alaska Packers Association v. Industrial Accident Commission of California, et al*, 294 US 532.

\* \* \*

39. Splitting a cause of action cannot engage Vermont jurisdiction, nor can it be used to evade res judicata, 46 Am.J 2d 405, 406. Otherwise there would be no end to



litigation, and no judicial authority. The "continuousness" which plaintiff asserts for his "irreconcilable separation" ended with judgment thereon in the New York jurisdiction.

40. None of the state cases submitted by plaintiff in his MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS and his RESPONSE TO DEFENDANT'S AMENDED MOTION TO DISMISS, purporting to show the legitimacy of Vermont jurisdiction, involves prior judgment, especially in another state. The United States Supreme Court cases submitted by plaintiff uphold prior judgments, except where jurisdiction was lacking, and do so not because those judgments grant divorce, but because they are judgments. *Williams et al v. North Carolina*, 325 US 226, clearly stands against plaintiff, not in his favor. New York having rendered the original judgment, which stands unreversed, must, in defense of its own policies and power over its own citizens, find any subsequent Vermont grant of "irreconcilable separation" divorce to plaintiff jurisdictionally void. Plaintiff's proposed remarriage, like the remarriage in *Williams II*, would be bigamous.

#### EIGHTH AFFIRMATIVE DEFENSE: RES JUDICATA

41. Substantially the same cause of action was heard and decided between these parties adversely to plaintiff in 1980, New York Divorce Index #35892-79.

a. Plaintiff's "separation" is alleged as a first cause of action in his New York Verified Complaint, paragraphs 1, 2, and 8, and in his Amended Complaint paragraph 7; and as a second cause of action in his

Verified Complaint, paragraphs 13 and 16, and in his Amended Complaint paragraphs 15, 21, and 22.

b. At trial the parties litigated the fact that, pursuant to New York's "no-fault" divorce law, DRL section 170(6), attached, plaintiff had offered defendant a written separation agreement drawn by his then attorney, Jeremiah Gutman, in May, 1974. "No-fault" divorce by conversion from written separation agreement is therefore the law of this case. The fact that defendant declined to sign the agreement, and that plaintiff failed to meet the test of the ground, does not mean that "no-fault" separation divorce does not exist in New York. It must be treated as having been raised in the New York pleadings, plaintiff having failed in his proof.

c. At trial plaintiff argued unsuccessfully that the parties' property and financial arrangements, and defendant's move to Vermont, constituted her agreement to separate. These issues must likewise be treated as having been raised and disposed of in the New York pleadings and action.

d. At trial Justice Blangiardo explicitly asked plaintiff if he would like to seek judgment of separation rather than divorce, which option plaintiff explicitly declined.

e. At trial plaintiff broadened his pleadings as written to include the impossibility of reconciliation, or, "dead marriage." Trial, decision, and plaintiff's appeal were made on the "dead marriage" theory. The FINDINGS, JUDGMENT, and NOTICE OF APPEAL AND PRE-ARGUMENT STATEMENT are attached, certification

applied for as attested in the defendant's attached AFFIDAVIT and evidence. In this context, the parties testified to plaintiff's refusal of marital counselling. Under VRCP 15(b), therefore, the issue of separation for more than 6 months without reasonable probability of resumption of relations must be treated in all respects as if it had been raised in the same words in plaintiff's written New York pleadings.

42. The New York JUDGMENT, attached, denies divorce. Justice Blangiardo's opinion, attached, finds as fact that plaintiff did indeed leave defendant and their home "never to return," page 2, paragraph 5. Page 5, paragraph 1, finds the "dead marriage diagnosis" factually unwarranted nevertheless. The Court's phrase "never to return" therefore determines "dead marriage" factually unwarranted today and into the future as well, unless substantial change of circumstances should intervene. None has.

43. If the issue of the "dead marriage diagnosis" were immaterial under New York law, the Court would have said so. Plaintiff, waiving pursuit of the appeal he filed, waived the possibility that the Appellate Division might have said so.

44. Plaintiff pleaded in New York all circumstances presently raised, including defendant's relationship with her present companion, plaintiff's own prior relationship with his present companion, and his wish to marry her.

45. Trial lasted at least 7 days. The parties exhaustively litigated all matters and circumstances known in July of 1980, including such matters, then known, as the parties may yet have to raise anew.

46. The decision denying divorce with regard to separation and "dead marriage" is final, conclusive, and binding everywhere, since plaintiff filed appeal on that issue, the Appellate Division accepted the appeal 12/9/80, and plaintiff then abandoned it.

47. No jurisdictional defect appears on the face of the New York record.

48. A judgment denying divorce has res judicata effect, 24 Am.J 2d 456 and 1103. It is conclusive with regard to relief denied or withheld, 24 Am.J 2d 426 and 46 Am.J 2d 404.

49. Prior judgment from a Sister State supersedes the policies of the forum state even if hostile thereto. Local policy must give way.

50. Judgment not timely appealed stands conclusive even if erroneous under New York law.

51. Vermont cannot recognize any collateral challenge not permissible in New York.

52. Such "continuousness" as might be said to characterize the situation of "irreconcilable separation" ends upon judgment. Courts cannot function if judgments have no finality. There would be no end to litigation and no repose to litigants.

53. Plaintiff may not split his continuous, indivisible cause of action. He has maintained his "separation" uncompromisingly since 1974, and cannot divide it into temporal units in order to go forum-shopping in scorn of judgment.

54. Article 4, section 1 of the Constitution of the United States, and 28 USCS 1738, bar plaintiff's action under the Full Faith and Credit owed to the JUDGMENT of New York.

55. The Constitutional credit owed is to be not niggardly, but generous and full – not limited or modified by the passage of time.

56. Vermont State power cannot Constitutionally be used to undermine either defendant's federally protected rights in the JUDGMENT, or the State power of New York, so crystallized, ever its own resident.

57. Full Faith and Credit is not modified by questions of fault or of which state's divorce policy is better.

58. Defendant realleges paragraphs 37 and 38. The interest of New York in this matter is greater than the interest of Vermont, and the interest of Vermont accords with that of New York.

#### NINTH AFFIRMATIVE DEFENSE: ESTOPPEL

59. Defendant realleges her Affirmative Defenses of WAIVER and LACHES, above.

60. If, for the sake of argument only, plaintiff's present cause of action may be considered different from the irreconcilable separation pleaded in New York, plaintiff is nevertheless collaterally estopped from asserting at least the following:

a. "No-fault" separation grounds and judgment of separation, since both were heard in New York.

- b. Separation for any length of time, past or prospective.
- c. Reconciliation not reasonably probable.
- d. Defendant's relationship with her present companion.
- e. Plaintiff's prior and continuing relationship with his present companion, and his wish to marry her.
- f. Property division, other financial arrangements, and defendant's move to Vermont.
- g. Defect in New York jurisdiction.
- h. Other matters known to the parties in July of 1980.

61. If the issue of "dead marriage" were immaterial to the New York determination, Justice Blangiardo would have said so. If plaintiff considered it so, he would not have broadened his written pleadings to include it, and would not have filed appeal on that very basis.

62. Judgment denying divorce has estoppel effect even if the cause of action is different, 24 Am.J 2d 456.

63. Plaintiff is equitably estopped from asserting Vermont jurisdiction.

- a. He successfully accomplished New York jurisdiction over the person of defendant by serving her personally in New York, with costs to her of \$29,000 resulting.

- b. No transcript is available to defendant.

- c. Plaintiff used 7 years' delay in the stipulated New York jurisdiction to minimize child support, and to



enforce the economic deprivation which threatens our daughter's education and compels defendant to bring her case pro se.

d. Divorce granted in New York would have permitted enforceable alimony for the defendant, and may in the future, should she decide to seek divorce. Divorce granted in Vermont would not.

\* \* \*

64. Plaintiff is estopped from alleging time elapsed in defendant's Constitutionally guaranteed repose in the New York JUDGMENT, to nullify that JUDGMENT or limit its force and effect.

\* \* \*

DEFENDANT'S AFFIDAVIT IN SUPPORT OF ANSWER,  
filed December 9, 1988:

(Caption Omitted In Printing)

\* \* \*

3. All matters stated herein to have been litigated in New York Divorce Action Index #35892-79, were so litigated, to my personal knowledge.

\* \* \*

(Caption Omitted In Printing)

ATTACHMENT TO ANSWER

SUPREME COURT  
OF THE  
STATE OF NEW YORK

SEAL

MORRIS LORBER  
Principal Court Reporter

July 29th, 1988



60 Centre Street  
New York, N.Y. 10007  
212 374-8516

MS. MARTHA ZWEIG  
P.O. Box 1038  
Hardwick, Vermont 05843

RE: ZWEIG v. ZWEIG

Dear Ms. Zweig:

Responding to your letter of July 10th, please be advised that after conferring with the reporters who worked on the above-mentioned case, I am sorry to inform you that their notes have long since been discarded. As a result, they obviously cannot furnish you with the testimony you desire.

\* \* \*

Very truly yours,

/s/ Morris Lorber

\* \* \*

DEFENDANT'S LETTER TO MRS. BARBARA TERRILL,  
Clerk of the Caledonia Superior Court, accompanying her  
ANSWER, December 9, 1988:

\* \* \*

With regard to scheduling please be advised that, after the holidays, Defendant will be submitting a MEMORANDUM IN SUPPORT OF ANSWER TO THE COMPLAINT . . .

\* \* \*

MOTION FOR CONTINUANCE, filed January 3, 1989:

(Caption Omitted In Printing)

\* \* \*

3. The reasons for this requested delay are as follows:

a. Defendant is surprised. *Zweig v. Zweig* was not among the first 20 cases on the docket calendar for this term, but is # 51. Defendant notes that the other divorce cases scheduled for the week of January 2 are #'s 15, 22, and 13.

b. At receipt of the term calendar, I was advised by an attorney I consulted that a case numbered 51 would not be scheduled until spring. See attached. AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE.

c. The Court's proposed date, 1/6/89, was unknown to me until receipt of the weekly calendar on 12/22/88. Mrs. Barbara Terrill, Clerk, advised me that the Court would not be available to entertain a motion for continuance until 1/3/89, see attached affidavit.

d. Defendant pro se is unprepared for trial.

e. Evidence vital to my affirmative defenses, including, but not limited to, RES JUDICATA and ESTOPPEL, is not yet available, despite diligent efforts for many months to obtain it from the New York court. VRCP 44(a), VRE 902 and 28 USCS 1738 require "exemplified copies" of the findings, judgment, notice of appeal and pre-argument statement and Justice Glen's Order in Divorce Action Index #35892-79, Supreme Court, New York County, State of New York, together with a certified statement from the custodial officer. I have ordered and paid for these documents, but have not yet received them.

\* \* \*

**DEFENDANT'S MEMORANDUM IN SUPPORT OF  
MOTION FOR CONTINUANCE, filed January 3, 1989:**

1. "Exemplified copies" of the findings, judgment, notice of appeal and pre-argument statement from Divorce Action Index # 35892-79, Supreme Court, New York County, State of New York, together with a certified statement by the custodial officer, are required for my affirmative defenses, including, but not limited to, RES JUDICATA and ESTOPPEL.

a. I have applied for and paid for these documents, as attested in the attached AFFIDAVIT and shown by the attached money order receipt and certified mail receipt.

b. The certification applied for is required by VRCP 44(a), VRE 902, and 28 USCS 1738. . . .

\* \* \*

4. Defendant's AFFIRMATIVE DEFENSES should be heard and determined prior to trial on the merits, as requested in paragraph 4 of her ANSWER.

a. As a matter of procedure, decision in favor of defendant on ILLEGALITY, WAIVER, FRAUD, LACHES, INSUFFICIENCY OF PROCESS, STATUTE OF LIMITATIONS, LACK OF JURISDICTION, RES JUDICATA, ESTOPPEL, DESERTION or FAILURE TO STATE A CLAIM OR CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED, or on all or several of them, would preclude trial on the merits by rendering it moot.

\* \* \*

5. Defendant pro se requires time to research and prepare a MEMORANDUM OF LAW IN SUPPORT OF ANSWER, to aid the Court in considering all possibilities for dismissal in advance of a confrontational trial on the merits.

a. If divorce should be granted, defendant cannot raise on appeal any point not raised below.

b. Under *Bloch v. Angney*, Vermont slip 12/4/87, the Court is encouraged to grant parties pro se full opportunity for written and oral argument.

c. Plaintiff's experienced attorney received a continuance of over one month to respond to defendant's original MOTION TO DISMISS, which is about  $\frac{1}{3}$  the length of my ANSWER. In the 10 days I had to write the ANSWER, it was clearly impossible to assemble all the citations and quotations on points raised. It would be to the advantage of plaintiff's attorney as well as the Court to permit me to do so now.

d. Consistent with family ties to my daughter on her Christmas vacation, and my parents during our annual holiday visit to them, I could not possibly prepare the MEMORANDUM.

e. Superior Court has the power and the responsibility to hear and rule on questions of law. In exercising them it may avoid appeal or at least narrow the grounds. A memorandum of law should therefore be welcome.

f. If maintained, the scheduling of trial on the merits less than one month after submission of the

ANSWER, when that month comprised the most exhaustive customary holiday obligations of the year, and despite notice to the Court of the pendency of certified documents, discovery, interrogatories, and efforts to engage a witness, has the appearance of prejudice.

g. Advance to trial on the merits without permitting preparation of a memorandum of law, and/or without awaiting receipt of essential certified documents in the prior case, has the appearance of premature rejection of the affirmative defenses, without opportunity for argument.

\* \* \*

10. The questions of Constitutional rights and of public policy raised by this case are fundamental, and deserve the fullest possible exposition.

\* \* \*

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE, filed January 3, 1989:

(Caption Omitted In Printing)

\* \* \*

2. Upon receipt of the docket calendar for this term, showing *Zweig v. Zweig* #51 of the Family Cases, I consulted an attorney briefly for an estimate of when a case so numbered might be scheduled, and he advised me that it would not be until spring.

3. I did not know of the 1/6/89 trial date until I received the weekly calendar in the mail on 12/22/88. I immediately telephoned Mrs. Barbara Terrill, Superior Court Clerk, and reiterated from my letter of 12/9/88,

attached, the pendency of properly certified documents from New York Index # 35892-79 and of discovery and interrogatories, the possibility of a witness, and my request in my ANSWER, paragraph 4, that affirmative defenses be heard first. I advised Mrs. Terrill that I was not and could not be prepared for trial on 1/6, and that I would move for continuance.

4. Mrs. Terrill told me the following:

a. that when she showed Honorable Judge Matthew Katz my ANSWER, letter, and accompanying documents, he ordered the early trial date;

b. that on this day, 12/22/88, Honorable Judge Kats was absent due to illness and would not be available to consider a motion for continuance until 1/3/89.

\* \* \*

TRIAL ON THE MERITS (transcript), excerpts, January 6, 1989:

(Caption Omitted In Printing)

(page 3, line 19 - page 4, line 17) THE DEFENDANT: I wanted to say for the record that I object to the ruling denying my application for a continuance. And I wanted to ask the Court for a statement of why the continuance was denied on the different points. Why was it not adequate ground to wait for the documents to come properly certified from New York, which I have been trying to get since July and applied for and paid for.

THE COURT: Well, I think the biggest reason is that I doubt that the contents of those documents are in dispute. I also doubt that the documents are relevant. I mean, we've been through all these issues on the motion



to dismiss, and I was loathe to postpone the trial to await documents that I expected to hold were irrelevant once they arrived . . . They may not be exemplified copies, but I also understand that their authenticity is not substantially drawn into issue, only their relevance.

\* \* \*

(page 7, lines 4-15): THE DEFENDANT: Why was no time granted for the preparation of a memorandum of law on my answer?

THE COURT: I don't understand why a memorandum of law on your answer is necessary. But again, this case has been pending for many months. There has been more than ample opportunity, and in fact the opportunity has been taken up by you, and you have filed extensive memoranda of law.

THE DEFENDANT: Not on my answer.

THE COURT: Mrs. Zweig, this case was filed in early 1988. It's now 1989. For a divorce case, it's ripe for hearing.

\* \* \*

(page 9, line 14 - page 10, line 2): THE DEFENDANT: I would like to move for a reservation of issues of alimony and finances and interrogatories until after the affirmative defenses have been determined.

THE COURT: Denied.

THE DEFENDANT: What is the reasoning?

THE COURT: The motion is denied.

Let's swear in the witness.



THE DEFENDANT: I'd like the affirmative defenses to be heard first.

THE COURT: The Plaintiff is going to have the opportunity to prove his case. When the Plaintiff rests, you may present evidence on whatever issues you deem appropriate.

\* \* \*

(page 10, line 7-10): DIRECT EXAMINATION BY MR. RUBIN OF MICHAEL ZWEIG:

Q State your name and address.

A My name is Michael Zweig, and I live at 275 Fort Washington Avenue in New York City.

\* \* \*

(page 11, line 16-21) Q And where does your wife live?

A She lives in Hardwick, Vermont.

Q In Caledonia County, is that right?

A I think that's right, yes.

Q How long has she lived in Hardwick?

A Since September or October of 1974.

\* \* \*

(page 20, lines 5-25): Cross by Defendant of Michael Zweig

Q Would you please tell the Court the names of the persons that you brought with you to Sierra's graduation at Hazen Union in June.

MR. RUBIN: Objection.

THE COURT: Sustained.

THE DEFENDANT: Your Honor, I'd like to approach the bench and tell you why it's relevant. May I?

THE COURT: You may make an offer of proof on the record. I mean, we're here to prove residence, marriage, separation, and you may have a claim for alimony or property division.

THE DEFENDANT: This goes to the point of separation. As your Honor knows, I have denied in my complaint that the parties separated, or that we separated. What happened was, that Defendant (sic) deserted us, abandoned us without cause due to the influence of some persons, including those that he currently brought to Vermont to Sierra's graduation. I'd like to establish the continuity of that.

THE COURT: I'm going to sustain the objection.

\* \* \*

(page 21, lines 2-23) Q Michael, who wanted to separate from our home, and who did in 1974?

A We weren't getting along, and I left the house.

Q Who wanted you to leave?

A I wanted to leave.

Q And what was my view of you leaving?

A You didn't want me to.

Q Why did you want to leave?

A Because we were having an impossible broken down marriage that wasn't viable for me or for you or for Sierra, and it was time for it to end.

Q Would you please describe the discussions that you had with members of the Revolutionary Union about our marriage.

MR. RUBIN: Objection. It's hearsay, and there is no relevance to it.

Q Discussions that you directly participated in.

THE COURT: Objection sustained.

THE DEFENDANT: Your Honor, this has everything to do with why the Plaintiff left us. It was - Well, I'll testify to it myself.

\* \* \*

(page 22, line 5 - page 30, line 8) Q What were the issues for you? Why did you tell me that you wanted to leave?

A Because we had a broken down marriage in which we were constantly fighting, constantly embattled, constantly at odds. And there was no point in continuing it.

Q What was it about?

A It was about all aspects of our living together. It was about sex, it was about kindness, it was about life in the world, it was about politics, it was about every aspect of our existence across the board.

Q Would you tell the Court about the political part, please.

MR. RUBIN: Objection.

THE DEFENDANT: Your Honor, the Plaintiff has testified that that was part of our discussions.

THE COURT: Yeah, but I'm not sure what issue in this divorce it's relevant to.

THE DEFENDANT: It is the essential feature of why he left.

THE COURT: I'm going to sustain the objection.

THE DEFENDANT: I object to the ruling.

THE COURT: You don't have to preserve an exception once you've asked the question. You have an appeal right.

THE DEFENDANT: Okay, thank you.

Q Did you at any point suggest marital counseling or family counseling?

A I suggested that you see a psychiatrist, and I suggested that we consider counseling, and I looked into marriage encounter. I did look into the marriage encounter and decided that didn't seem to be appropriate.

Q Why not?

A Because marriage encounter, and other similar family counseling plans, seemed to be designed for people who have a difficult time communicating with one another. Though procedures of marriage encounter and other similar things is to get parties who just won't talk to one another, to write notes and to take the steps that are necessary to open up lines of communication when

they're frozen. We did not have any problems communicating with one another.

We both understood very well where we were going and what we were about, and there wasn't any problem in communications. So that those facilities that are provided by marriage encounter were irrelevant to our needs. That's why.

Q Isn't it true, Michael, that I entreated you frequently that we had no time to talk together, because you were always at meetings and demonstrations and away and coming back two, three in the morning or not at all, and that when we did talk it was nothing but political jargon; did I say those things to you?

A Martha, it was fifteen and sixteen years ago, and I don't remember the details of our conversations.

Q Did I suggest marital counseling?

A I think that you wanted it. I looked into it, and we looked into it, and we didn't do it.

Q Subsequently to the marriage encounter matter, did - wasn't it true that for marriage encounter you had to be willing to take a block of time, like a week or two, and spend it at marriage encounter doing nothing else?

A I don't remember that that was their procedure, no, I don't know that.

Q When I suggested marital counseling, what was your response?

A I looked into marriage encounter and found out that what they offered was not what we needed.

Q When I suggested marital counseling after that?

A I don't remember the details of the timing of any of this, Martha; it's sixteen years ago.

Q Who determined that marriage encounter was not a good thing for us to do?

A I don't know. What do you mean, "Who determined"?

Q Did we decide that together?

A No, it was one of the many things that we had irretrievably broken down about, Martha.

Q Which one of us decided that marriage encounter was not a good thing to do?

A I think that I thought that it was not appropriate, for the reasons that I've just said.

Q What was the view of the Revolutionary Union on people spending time with personal lives and personal issues?

A I don't quite get what you're asking. Did the Revolutionary Union have a position about people talking about their personal lives?

Q That's correct.

A Of course the Revolutionary Union people talked about their personal lives, all the time.

Q What was their position of people spending a lot of time on it?

A I don't know that we had a position. We had a position that marriage was very important, and that we

should spend some time thinking about and preserving and talking about and encouraging stable monogamous relationships.

Q "We"? So you were a member of the Revolutionary Union at this time?

A Well, I was a member of the Revolutionary Union at sometime. I don't know about this time.

Q When?

A Gosh, I don't know when I joined.

MR. RUBIN: I object to an affiliation in the early 70's, sixteen years ago. I don't see any relevance to this.

THE DEFENDANT: The relevance was that this was the fundamental cause of the Plaintiff leaving our home.

THE COURT: Let me say that the Court has been dealing with alimony issues several times a week. And I really don't see that any political activities of one spouse more than fourteen years ago are going to bear on the decision to award or not award alimony. They obviously have nothing to do with whether the parties have lived separate and apart for more than six months.

THE DEFENDANT: Yes, that's what it does have to do with.

THE COURT: Let me ask a question to clear the air. Do you deny, Mrs. Zweig, that you and Mr. Zweig have lived separate and apart for more than six consecutive months, this being January 6th, 1989?

THE DEFENDANT: I deny that we have done that jointly as two people. What has happened is that Plaintiff,



under the influence of the Revolutionary Union, deserted us. He has maintained that desertion ever since; has consistently refused to talk about any of it whatever.

THE COURT: I think you've made your position clear, and that is that you have never consented to it or played a part in that separation.

THE DEFENDANT: That's correct.

THE COURT: And that it was the unilateral act, in your view, of Mr. Zweig in leaving you.

THE DEFENDANT: It was more than unilateral, it was against my will and against my conviction. Still is. and this has been -

THE COURT: I'm going to sustain the objection regarding political activities prior to the separation. I think they're irrelevant.

Q When did you first meet Kathy Chamberlain?

A In 1974.

Q In what context?

A In the context of our common interest in politics and life in New York, particularly in our interest in China.

Q And in what context did you get to know her better?

A Through that work.

Q What groups did you and she work with?

MR. RUBIN: I'm going to object. If the issue is whether he left this marriage because -

THE COURT: Objection sustained.

Q You've mentioned working with Kathy on an interest in China; did that have to do with the U.S. - China Peoples's Friendship Association and New China Magazine?

MR. RUBIN: Objection.

THE COURT: Sustained.

Q When you finally left Sierra and me, why did you leave at the particular time that you did?

A Well I don't know why I left at that particular moment. I remember that I thought, well, this is going to have to be done, let's do it. I made a decision, and I did it.

Q Did you then bring me a separation agreement?

A Yes, a draft of a separation agreement.

Q And who prepared the separation agreement?

A It was prepared by me with a lawyer in New York City.

Q And what's the name of the lawyer?

A Jeremiah S. Gutman.

Q What was my response to the separation agreement?

A You rejected it.

Q Did Jeremiah Gutman advise you that the separation agreement was a step towards no fault conversion divorce in the state of New York?

MR. RUBIN: Objection.

THE COURT: Sustained.

Q Did you believe that it was?

A I believed that it would be a good thing for us to have a separation agreement.

Q Did you also believe that it was a step towards no fault conversion divorce in the state of New York?

A I hoped that it would be a step towards a divorce in New York.

Q Did you believe that it was a step towards no fault conversion divorce in the state of New York?

A I understood that having a separation agreement would be a step towards – could be a step towards a divorce in New York. I don't know about a no fault conversion, whatever that terminology is.

Q Did you believe that it was a step towards no fault divorce?

A I didn't know anything about no fault divorce. I believed that if the people have a separation agreement, in New York after a year they can get a divorce. That was my understanding of the situation.

Q Did you discuss it with your attorney?

A Sure. I wanted a divorce, Martha, I still do.

Q Why were you in doubt about no fault?

MR. RUBIN: Objection.

THE COURT: Sustained.

\* \* \*

(page 31, line 25 – page 33, line 21) Cross by Defendant of Michael Zweig:

Q When and where did you first tell me that you and Kathy were living together?

MR. RUBIN: Objection; relevance.

THE DEFENDANT: Your Honor, I'm trying to show that this matter was discussed, raised, heard in the New York trial in 1980, which it was. Therefore, it is relevant when I first knew of it and when Plaintiff first told me about it.

THE COURT: Objection sustained. What happened in the New York trial is not relevant, because we are here to determine whether grounds for divorce exist under the law of this state at this time, and whether grounds under New York law existed in 1980 are not relevant to the question of whether grounds exist now.

THE DEFENDANT: Your Honor, it is relevant under the doctrine of collateral estoppel, which is why I wanted to have the affirmative defenses heard first. Even – Personally, I think the causes of action are substantially the same, but even if they are different, any matter that was raised at the New York trial is estopped from this one.

THE COURT: The only issue on grounds in this case is whether the two Zweigs have lived separate and apart for more than six consecutive months, and whether the

resumption of marital relations at this time is reasonably probable.

THE DEFENDANT: The Plaintiff has asserted -

THE COURT: The objection has been ruled on. Go and ask another question.

Q When and where did you first tell me that you wanted to marry Kathy?

MR. RUBIN: I'm going to object.

THE COURT: Sustained.

Q When did you first know of my relationship with Peter Betnatski?

A A long time ago, I mean, I don't really remember, Martha.

Q Does 1977 sound right?

A Maybe 77, maybe 76, maybe 78. I don't know. It was awhile ago.

Q When and where did you first meet him?

MR. RUBIN: Objection.

THE COURT: Sustained.

THE DEFENDANT: May I ask why?

THE COURT: Because it appears to be irrelevant.

\* \* \*

(page 35, line 22 - page 36, line 4) THE COURT:  
... It may well be that Mr. Zweig, without good reason, abandoned you and the child fourteen years ago, but he is still entitled to a divorce under the law of this state.

THE DEFENDANT: Your Honor, I object, that that's prejudicial. It seems clear that the Court has made up its mind without hearing affirmative defenses and without hearing the case of the Defense.

\* \* \*

(page 39, line 25 - page 42, line 16) Q This is Defendant's Exhibit #B.

THE COURT: Why don't you give a one or two word description of it.

THE DEFENDANT: It's a 1976 issue of New China Magazine showing Kathy Chamberlain, Michael Zweig and some others on the mast head.

Q Would you identify this, please?

A Well, its a copy of New China Magazine.

Q And does it show you and Kathy Chamberlain as contributors?

MR. RUBIN: I'm going to object. It's now identified, and I don't see the relevance of who contributed to what magazines in 1976.

THE COURT: Well, isn't it an undisputed fact that Mr. Zweig and Ms. Chamberlain were probably living together at that time?

THE DEFENDANT: Yes.

THE COURT: What does it matter whether they wrote a magazine article together?

THE DEFENDANT: It matters. The group that this is.

THE COURT: Well, I don't know if it's Maoist or McCarthyite or anywhere in between. What does that matter?

THE DEFENDANT: It has to do with the circumstances of how this alleged separation happened.

THE RUBIN: It's two years after the separation.

THE DEFENDANT: And continuing.

THE COURT: Does the article talk about the separation?

THE DEFENDANT: No.

THE COURT: Objection sustained.

THE DEFENDANT: These are Defendant's Exhibit #C and Defendant's #D. Number #C is the Red Paper 7, How Capitalism Has Been Restored in the Soviet Union and What This Means for the World's Struggle, and it contains an article written by Plaintiff.

Exhibit #D is a magazine called The Communist, the theoretical journal of the Central Committee of the Revolutionary Communist Party U.S.A., May 1, 1977. And it also contains an article written by the Plaintiff.

Q Would you identify these, please.

A Well, this is Red Paper 7. And this looks like the journal, The Communist.

Q And are there articles written by you in either or both?

MR. RUBIN: I'm going to object. Interesting to watch a witch hunt in 1989 in Caledonia County. No relevance, it's been ruled irrelevant.



THE COURT: Well, Mrs. Zweig, what's the relevance of #C or #D?

THE DEFENDANT: I'd like to say that I don't condemn any of this. I'm not trying to accuse Michael of any crime or any impropriety on his job or anything, you know, no, I'm not doing that. What this has to do with is the particular line and style of a particular group as it affected our marriage. And the reason that he left, what was done to us from our happy purchase of a home in 1972, you know, something happened fast. And this is what it was.

All I'm trying to show with it is something very terrible that was done to us and our marriage. That's the only relevance it has.

THE COURT: I'm going to sustain the objection.

\* \* \*

(page 57, line 11 – page 58, line 21) THE COURT: All right, Defendant, it's your turn now.

THE DEFENDANT: I would like to be sure that I will get to try the affirmative defenses.

THE COURT: Well, you can present your case in any order that you wish.

THE DEFENDANT: Will it be continued to hear them and to hear my testimony?

THE COURT: I'm not going to – I want you to go ahead and present your evidence. If you present relevant evidence and there is on-going relevant evidence, we're going to hear all of it.

THE DEFENDANT: I'll begin with affirmative defenses, then, and I will request that I be heard in my own defense, as testifying as Plaintiff did, at a later time.

THE COURT: We're here to take testimony today. I mean, I've heard your affirmative defenses as a matter of argument, and I've read your memos.

THE DEFENDANT: I don't have a memo for the affirmative defenses. And it hasn't been heard.

THE COURT: I think there is a substantial overlap between the affirmative defenses, as you call them, and the motion to dismiss. This is your time to testify and offer the evidence supporting your claims. Why don't you do so now.

THE DEFENDANT: Before I testify as a witness, I would like to make an opening statement.

MR. RUBIN: I'm going to object to any opening statements. She can testify under oath. We don't have to repeat everything twice. I think she should just be sworn.

THE COURT: I want you to take the oath as a witness and testify as to the facts that you think are determinative.

THE DEFENDANT: I object to the ruling.

\* \* \*

(page 59, line 5 - page 64, line 8) Direct by Defendant of Defendant:

\* \* \*

I didn't know that financial statements are going to be done, but for what it's worth, my average pay is about \$5.38 an hour from the two jobs. I'm just beginning to make more than \$10,000 a year. And where the money has come from for a house and for Sierra's college, is from desperate sacrifice. No luxuries at all, ever.

Michael used to visit us in Hardwick. He saw the trailer that we lived in. He knew of the conditions that we faced.

When I refused divorce, he cut the money that he sent, which was inadequate even then. And as his income went higher and higher, the money never did. And he offered me money many times if I would consent to divorce, but I wouldn't. I felt like the marriage is not for sale, and I want to tell you why.

In 1972 Michael and I were pretty close and pretty happy, and we bought a house. We wanted to have a lot of space and maybe a second child. And then about eight months later everything was awful. And what happened in that short period of time was, that the political activity that we worked in together, were students at the Stonybrook campus, began to be organized by a new group called the Revolutionary Union. One member of it was Marta Cusick, who came to Sierra's graduation -

MR. RUBIN: Excuse me. I'm going to object to this. Again, the relevance of political activity. There wasn't any dispute when Mr. Zweig testified. I don't see any relevance now.

A I want to testify exactly how and what happened and -

THE COURT: I'll allow the Defendant to give her version as to what caused the separation.

Go ahead.

A So Marta Cusick was from the Revolutionary Union, and we, in July of 72, were at a meeting of the Stonybrook students and ourselves. And Marta and Micky Jarvis came in and began denouncing us as Trotskiists.

MR. RUBIN: Objection; hearsay.

A I was present.

THE COURT: Well, I don't think whether the truth of whether they're Trotskiites or not is an issue in this case.

Go ahead, Mrs. Zweig.

A I have personally never read Trotsky to this day.

It was very important to Michael what his students thought of him and his position in the political group. The organizing was very intense. The students and a couple of faculty, I guess, but mostly students were soon joining. It was a communist group, it called itself a communist group supporting China and Stalin.

And pretty soon the students were attacking Michael. They attacked his opinion of Mao's new democracy policy, they attacked his opinions of day care in China. They called him a liberal.

They attacked me for writing poetry, which was my profession. Poems from that period, won a state-wide award here in Vermont. And for a long time Michael and

I tried to support each other and to discuss our agreements and disagreements with the others. But it wasn't very long before the students who had joined the R. U. denounced Michael's political theory class that they were all in, and walked out and boycotted it. And Michael was very upset.

He thrashed over and over this with me about what the R. U. was like, but then he would say "Gee, maybe they really are the coming thing." And he was very afraid that he wouldn't have anybody to do politics with, is what he said to me. So a couple of days after the R. U. students boycotted his theory class, he joined the Revolutionary Union recruitment group, which was called The Shotgun.

He became a very different person. He told me that he was experiencing wild mood swings from rapture to despair. He told me he was feeling strong sexual attraction for everybody in the R. U., male and female. He walked differently. He got a kind of a swagger. He talked differently. His voice changed, his language changed and he became something of a bully, which was the style of the R. U. They behaved that way and considered it to be working class.

I didn't agree with the R. U. on some things, and I especially didn't like their style. So I didn't join, although Michael tried to get me to join. And pretty soon Michael was away most of the time, coming home two or three in the morning or not at all. And pretty soon he was telling me that I should stop writing poetry, that I didn't serve the people, although he had supported me before.

On March 2nd, 1973, I told Michael that I had been feeling pregnant, and that I hoped it was true. He acted very gloomy about that. And three days later he told me that there was no basis for us to be together. He told me that he wanted to live with a woman named Amy Hawkin, who was a member of the R. U. I talked to him and Amy and they allowed that -

MR. RUBIN: Objection.

THE COURT: Don't tell us what Amy said, you may say what Michael said.

A Michael said that they would stop, and that if I would stop writing poetry and if I would get a working class job instead of writing, and if I would drive, that he would spend the next year, his sabbatical year from spring of 73 to fall of 74 working with me on our marriage. So I did that.

I stopped writing and I got jobs as a nurse's aide, and eventually the best one was cleaning in a nursing home. But he never did anything about our marriage. He wasn't there. When he was there, he talked in political jargon. There was no human person.

I complained to him that the work that was supposed to be happening on our marriage wasn't happening. And he said that the Revolutionary Union was going to be the basis of our marriage. And since that was true, all the work that he was doing for the Revolutionary Union was work on our marriage. He became a so-called closed member of the R. U. Those are people who were secret who were not supposed to say that they were members of



the R. U., and a little bit later an open member, which was when you could say that you were.

We took a trip, the two of us, to Shenandoah National Park. One of the things that had always been a source of closeness and pleasure for us was camping. We went for a hike, and I wanted to sit by a stream. And Michael told me that it was counter-revolutionary to sit by a stream, because the nature question wasn't settled yet.

He didn't stay the year that he promised. When he left in 1974 I told him that it was wrong, that it wasn't appropriate to who we are and what we're like. He brought the separation agreement; I declined to sign it because the separation was wrong. Then he took off for six weeks with the Revolutionary Union to the Soviet Union, which is what brought about that article he acknowledged in Red Paper 7. And from then on everything was R. U.

\* \* \*

(page 65, line 3 – page 67, line 22) THE COURT: All right. The only issue in the divorce is whether or not you have in fact been separated for the last six months continuously. Now I understand that you wish to resume marital relations, however I have to make a determination as to whether that is reasonably likely to occur. And given a fourteen year separation, it would require some fairly substantial evidence that things are going to change.

Now one more thing I want to say. You do not have the option of reserving an alimony claim until sometime



later. If you want to seek alimony in the event a divorce is decreed, now is the time.

A Well, I mean there is nothing in particular to say about it, except what I have. There are further defenses against this divorce. The main one is the judgment in New York, which found as fact that the Plaintiff had left our home never to return, and found -

THE COURT: I've already ruled on the motion to dismiss that that judgment is irrelevant to the question of whether or not Mr. Zweig and Mrs. Zweig have lived separate and apart for more than six consecutive months.

A The judgment wasn't submitted at that time, your Honor.

THE COURT: Well, but it was discussed in full.

A This would make an estoppel on that issue, a collateral estoppel. And I would like to have a continuance to hear the issues in the affirmative defenses which are lengthy and complex, and I think determinative of this whole thing.

MR. RUBIN: Your Honor, I think she's operating under one misapprehension. I think Mrs. Zweig said in one of her pleadings that a she believes she has to read into the record her arguments with respect to the affirmative defenses rather than have the Court deal with those in writing.

What I would ask is that you require her to introduce any factual or documentary evidence now. And then if she needs a week or two to write a memorandum, the Court can, or not if it wishes, grant her that at that time.

But I think she's under a misapprehension that she has to read everything into the record by way of argument.

A Well I do have documents that I have to introduce, and that is the properly certified documents from New York. And the reason that I have to introduce them is because that proper certification is required under something 1738, the enabling statute of the full faith and credit clause of the federal Constitution.

THE COURT: I'm going to rule, though Mrs. Zweig, that the New York divorce judgment denying a divorce is not relevant to this case. This case is going forward only on the question of whether you and Mr. Zweig have been separated more than six months. I take it as undisputed that you have lived separate and apart since 1974.

A The New York judgment is based on a finding that Michael left us, never to return.

THE COURT: And I assume that that is true, but it doesn't change the fact that that happened more than six months ago, and that's the only thing that's relevant at this proceeding.

A But never goes on into the future. And based on that finding, Justice Blanchiardo said that the diagnosis of dead marriage was not warranted. And there is a case -

THE COURT: I assume he was correct at that time, but dead marriage is not the test now. The test now is on January 6th, 1989, is there a reasonable likelihood of reconciliation.

\* \* \*

(page 67, line 22 - page 68, line 4) THE COURT:  
... And let me ask you a question. Do you think today  
that Mr. Zweig is likely to resume living with you?

A I think that people change. I've seen it. God  
knows. And I remember that he used to talk about  
periods of review in life, getting older. I think that's  
possible.

I don't want to leave it like this, or have it left like  
this.

\* \* \*

(page 69, line 2 - page 70, line 18) THE COURT: All  
right. Is there anything else you would like to say on the  
possibility or probability of a reconciliation between  
yourself and Mr. Zweig?

A I'd like to say that he and I should talk. And we  
should talk about all this stuff. He's been a stone wall for  
fourteen years. He came to Sierra's graduation with  
Marta and Kathy from the old R. U. and everything else,  
and a couple of other people. I managed to catch him in a  
movie, his head in the crowd.

After the ceremony I went over to where he and the  
others were standing with Sierra, Michael was talking to  
Sierra, and I said hello to Kathy, whom I knew a little bit,  
and hello to Marta whom I knew. And then I said hello to  
Michael and congratulations. I felt very parental. And  
there is all kinds of crowds around. And he yelled at me  
to get lost. And Sierra kind of freaked out. I was very  
surprised.

It reminded me a lot of an incident in 1978 when he came up to the trailer and he had brought for Sierra a stuffed rabbit, kind of a puppet thing. And he was real pleased with it. And I thought it was a wonderful looking rabbit. And we had this moment, the two of us, where we were parents and we were enjoying that rabbit. And five minutes later Michael was screaming at me so that I left the house.

And the reason that reminds me of graduation is because there are these moments that happened. And he doesn't seem to want them to happen, and seems to have to take rather excessive measures to prevent them from happening. That's how it appears to me.

So, I think there's a window there. I do.

I would like to have a ruling from your Honor on whether or not I'm going to be permitted to wait to submit the properly certified papers from New York.

MR. RUBIN: I'll stipulate the admissibility of the New York documents, just to make sure we don't have any problems here. The Court has copies, and I will stipulate to their admission. We submitted certified copies. She feels that's not adequate for admission. She may be technically right, but I'm not - you asked me earlier if I would stipulate to those, and I will.

\* \* \*

(page 72, lines 3-25) A I want to add that in 1973, and I guess 74, when the Revolutionary Union was talking with Michael about our marriage, all these discussions were happening without me there. And I complained of this. And so, twice delegations came to see

me. Michael was not in either delegation. The first one was on April the 8th in 1973 when the R. U. informed me that I would have to -

MR. RUBIN: Objection.

THE COURT: Well, I don't think this is being offered for the truth of the matter contained.

Go ahead.

A That I would have to stop writing poetry.

THE COURT: I think we've covered this.

A Well the point I'm trying to establish is that a delegation coming directly from the Revolutionary Union to me talking about our marriage.

The second one was in the fall of 1973 where they told me specifically that unless I was coming closer and closer to the Revolutionary Union all the time, Michael's and my marriage would fail.

Now I don't think that's what Vermont means by no fault divorce. I don't think that's what anybody means by no fault divorce.

\* \* \*

(page 72, line 25 - page 74, line 14) THE DEFENDANT: . . . And I would like to refer, not as a matter of testimony now but as a matter of a pro se attorney, to the case of *Ryan v. Ryan*, which I believe I have cited in there, which calls this kind of thing a fraud upon the spouse and a fraud upon the Court. And I'd like to quote from that case, if I might.

THE COURT: Well, you've cited the case of Ryan versus Ryan, so we can read it. I have your citation.

A Well, it talks about the fraudulent creation of the grounds -

MR. RUBIN: I'm going to object to argument from the witness stand.

THE COURT: Well, all right.

MR. RUBIN: We'll go on forever.

THE COURT: I don't think we should be too technical about whether the Defendant stands or sits.

MR. RUBIN: It will go on for hours, though.

THE COURT: I infer that the Defendant is drawing her presentation to a close.

A Well, is the case that I'm not going to be permitted to do anything more with affirmative defenses?

THE COURT: Well, I've read through your affirmative defenses, and I don't believe that any of them are sufficient.

A Well, I will be arguing that, I guess. I would like to object to that ruling, and then because I think they're essential, they have to do with the Constitution and so on. I will be appealing on them. And I will wrap it up, if the Court would like, with a quote from *Ryan v. Ryan*.

MR. RUBIN: I'd like the record to reflect that the Court is not cutting her off on a factual introduction of the factual basis for affirmative defenses. And that she has made no offers to which -



THE COURT: The Court is making a legal ruling, having read the extensive affirmative defenses which are not merely labels as the lawyers are sometimes prone to do, but actually set forth the claims. That they are not legally sufficient. That's a legal ruling.

\* \* \*

(page 75, lines 1-10) THE COURT: I'm going to have to disappoint you, Mr. Rubin. The real candid answer is, she is being cut off from being given an opportunity to expound on what the Court considers to be insufficient defenses. I mean, anything else would be sticking a label where it doesn't belong. I mean, I think these defenses of fraud and res judicata and absence of jurisdiction and the others are ill founded. And I'm going to so rule. And that means that Mrs. Zweig's appeal issues are preserved.

\* \* \*

(page 79, lines 16-25) MR. RUBIN: The real problem is about an alimony order here.

THE COURT: I understand that. All I'm asking is whether there is any objection to including a support order, understanding it to be just a repetition here, although frankly that would appear to me to be useless, because there is no personal jurisdiction that's likely to be effective over Mr. Zweig in this state.

A That's the problem.

MOTION FOR ADMISSION AND JUDICIAL NOTICE OF DOCUMENTS, filed January 12, 1989:

(Caption Omitted In Printing)



1. The undersigned defendant pro se herewith presents, certified pursuant to VRCP 44(a), VRE 902, and 28 USCS 1738, the following documents from Divorce Action Index #35892-79, Supreme Court, New York County, State of New York:

- a. Summons with Notice
- b. Affidavit of Service
- c. Amended Complaint
- d. Amended Verified Answer and Counter-claim
- e. Findings
- f. Judgment
- g. Notice of Appeal
- h. Pre-Argument Statement
- i. Appellate Division Acceptance
- j. Order by Justice Kristin Booth Glen
- k. Custodial statement by Stanley S. Ostreau, Justice of the Supreme Court of the State of New York, and Norman Goodman, County Clerk and Clerk of the Supreme Court, New York County

2. Defendant pro se moves the Court to take judicial notice of these documents, admit them as evidence, and include them in the record in the above-entitled action, plaintiff and the Court having indicated on the record that there is no objection to them.

3. Defendant has noticed plaintiff and the Court at numerous points on the record, especially in her MOTION FOR CONTINUANCE and AFFIDAVIT IN

SUPPORT thereof, that these documents have been diligently sought for many months and that they are essential to her affirmative defenses, including, but not limited to, res judicata and estoppel.

\* \* \*

5. Plaintiff has affirmed, on the record, that defendant is "technically right" that the certification herewith presented is essential to her defenses.

\* \* \*

MOTION TO REOPEN EVIDENCE, RECONSIDER AND CLARIFY JUDGMENT . . . filed January 18, 1989:

(Caption Omitted In Printing)

\* \* \*

B. The Court did not permit affirmative defenses to be heard, or memoranda of law to be filed upon them, and has not addressed with particularity the points thereon asserted in Defendant's Answer.

1. VRCP 12(d) provides that affirmative defenses "shall be heard and determined before trial on application of any party, unless the Court orders that hearing and determination thereof be deferred until trial."

a. Defendant applied for hearing of affirmative defenses before trial in her Answer, paragraph 4.

b. The Court made no order deferring such hearing until trial.

c. Defendant, in her Motion for Continuance of 1/3/89, asked again for time to prepare a memorandum of law and that affirmative defenses be heard first, and

stated that 1/2 day's trial would not be time enough to hear them.

d. At trial the affirmative defenses were not heard at all. The Court, in its sweeping declaration that all are without merit, has not addressed them with particularity.

e. Defendant therefore has no guidance in preparation of her appeal.

2. Honorable Judge Meaker, ruling for this Court in S98-87 CaF, held that the parties were to address the question of res judicata on the merits in New York with supporting law. Now the Court has not given the parties opportunity to do so. Since Plaintiff has not done so, Defendant is not dilatory.

\* \* \*

MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; TO MAKE ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER . . . filed January 18, 1989:

(Caption Omitted In Printing)

Defendant pro se moves the Court as follows:

I. To amend its present findings as follows (numbered paragraphs below to correspond with the numbered paragraphs of the Court's Findings of Fact, Conclusions of Law and Order, 1/9/89):

1. These parties were married in 1965 (see Complaint, paragraph 3). Plaintiff husband left Defendant wife, their child, and the marital home in April, 1974, and has remained continuously unwilling to live together in

the fourteen years since that time. In accord with New York's Domestic Relations Law 170(6), providing for "no-fault" divorce, Plaintiff husband in 1974 presented Defendant wife with a separation agreement drawn by his then attorney, which Defendant wife declined to sign.

\* \* \*

9. Add: Divorce Action Index #35892-79, Supreme Court, County and State of New York. The matters of Plaintiff husband's refusal of counselling, the separation agreement towards "no-fault" divorce which Defendant wife declined to sign, the parties' other companions, and Plaintiff husband's wish to remarry, were heard therein. Plaintiff husband pleaded his own departure from his wife and the marital home, and her subsequent move to Vermont, as causes of action in his Complaint. At trial he pleaded in addition New York's "dead marriage" doctrine, under which he asserted that he would never reconcile and never return to his wife, as a cause for divorce to be granted. The Court ruled that Plaintiff husband had indeed left Defendant wife "never to return," but held the "dead marriage diagnosis" unwarranted nevertheless. Plaintiff filed appeal in New York on the basis of the "dead marriage" doctrine, but never ordered a transcript and abandoned the appeal. The reporter's notes have since been destroyed in normal course due to lapse of time, and no transcript record thereof is available to Defendant.

\* \* \*

II. To make additional findings as follows:

11. The jurisdiction of subject matter and persons in New York Divorce Action Index #35892-79 is unquestioned.

\* \* \*

14. There has been no change in marital circumstances since the New York trial in 1980.

\* \* \*

III. To amend Conclusions of Law as follows:

D. To read: Plaintiff husband, against the will of Defendant wife and without her consent, has willfully deserted her and has maintained his desertion continuously for a period in excess of fourteen consecutive years.

F. Eliminate the third sentence, "even . . . today". (Defendant has never contended that New York found reconciliation likely. She has pointed out, on the contrary, that New York found that Plaintiff husband had indeed left her "never to return".)

H. Defendant requests that the Court make specific Conclusions of Law on each of the points in her Affirmative Defense.

\* \* \*

J. Substitute, as stated at trial, "The Vermont Courts lack sufficient personal jurisdiction of Plaintiff and his employer, and therefore cannot award or enforce alimony."

\* \* \*

January 27, 1989

RE: ZWEIG v. ZWEIG, Docket  
Number S51-88 CaF

Dear Honorable Judge Katz:

I have received the DIVORCE DECREE and ENTRY filed by the Court on 1/26/89.

The ENTRY does not state the Court's ruling on Defendant's MOTION FOR ADMISSION AND JUDICIAL NOTICE OF DOCUMENTS, dated 1/11/89 and filed 1/12/89.

These documents, delivered in person by Defendant to the Court, are the exemplified copies from New York Divorce Action Index #35892-79, Supreme Court, County and State of New York, Plaintiff's first divorce action.

They are the heart of my defense under Full Faith and Credit, Article IV, Constitution of the United States. As shown in earlier submissions to the Court, I diligently sought these documents, properly certified under USCS 28, section 1738, since 7/10/88. The letter of Morris Lorber, Principal Court Reporter, Supreme Court of the State of New York, dated 7/29/88, submitted, caused delay by misleading me to the IAS Legal Support Office, which never responded to my certified letters.

28 USCS 1738 provides that

"The records and judicial proceedings of any Court of any . . . state . . . or copies thereof, shall be proved or admitted in other Courts within the US . . . by the attestation of the clerk and seal of the Court annexed, if a seal exists, together with a certificate of a judge of the Court that the said attestation is in proper form."

At trial on 1/6/89, the Court, explaining its denial of Defendant's MOTION FOR CONTINUANCE, filed 1/3/89, stated that since Defendant had submitted uncertified copies of these documents with her Answer, and since Plaintiff did not object to the contents, it was unnecessary to delay trial.

It is therefore on the record that Plaintiff has no objection. Plaintiff has, additionally, not objected to Defendant's MOTION FOR ADMISSION AND JUDICIAL NOTICE OF DOCUMENTS.

Defendant therefore seeks the Court's ruling admitting them as evidence and taking judicial notice, as moved, so that the record is complete. Thank you.

Sincerely,

/s/ Martha Zweig  
Martha Zweig, Defendant pro se

STATE OF VERMONT  
VERMONT SUPREME COURT

MICHAEL F. ZWEIG,  
Plaintiff-Appellee

v.

MARTHA MACNEAL ZWEIG,  
Defendant-Appellant pro se

SUPREME  
COURT  
NO. 89-120

DOCKETING STATEMENT: QUESTIONS TO BE RAISED  
ON APPEAL, filed March 1, 1989

Excerpts:

\* \* \*



I. . . f. Plaintiff-Appellee sued Defendant-Appellant for divorce in New York in 1978, as a direct consequence of 15 VSA 592.

1. His New York pleadings show the "separation" as a first and second cause of action. At trial he broadened his pleadings and argued the issue of irreconcilable separation. The New York decision found explicitly that he had left me "never to return," but denied divorce. He filed appeal specifically on the issue of irreconcilable separation, but never perfected it, rendering the judgment final.

\* \* \*

4. The amendment of 15 VSA 592 is not intended to offer dissatisfied parties a second forum for issues already tried to final judgment in a Sister State, and such effect is prohibited by the Full Faith and Credit requirements of Article 4, section 1 of the Constitution of the United States.

II. The lower court has erroneously concluded that the fact that New York "may have once also had jurisdiction" does not divest Vermont "at a later time."

a. This formulation ignores the fact that New York not only "had" jurisdiction, but also *exercised* its authority upon its resident in *final* judgment, due to Plaintiff-Appellee's own voluntary actions and inactions. He invoked the exercise of New York authority upon the very issue he submits here, and abandoned his own appeal.

b. Vermont has no jurisdiction to subvert New York's exclusive power to modify and correct its own judgments.

c. Full Faith and Credit (unlike divorce for irreconcilable separation) is not discretionary. It requires that the New York judgment have the same effect in Vermont that it enjoys in New York. No plea is good against it that would not be good in New York.

d. Mere passage of time has no effect in New York of reversing or reopening the judgment, as Plaintiff-Appellee's own conduct in coming to Vermont amply demonstrates.

1. Full Faith and Credit does not expire with passage of time. If it did, someone would have to determine exactly *how long* a second state is barred from reversing a Sister State's prior judgment on the same issues and evidence.

2. By the lower Court's erroneous formulation, Vermont could reverse New York immediately, with no Faith and Credit whatsoever except the mere acknowledgement that the parties are still married. Since such acknowledgment would be equally due if *no* prior suit had been brought, the fact of prior action and final judgment is rendered weightless.

3. Passage of time cannot be invoked to split Plaintiff-Appellee's indivisible cause of action to evade the first jurisdiction he sought and engage another.

e. Defendant-Appellant is entitled to repose in the finality of the New York judgment, and such repose cannot accrue against her as a new cause of action.

f. New York has the absolute right to determine the conditions governing the marital status of its own citizens, and *has done so*.

g. Only jurisdictional defect showing on the face of the New York record could give Vermont jurisdiction to reverse the judgment upon the same issue.

\* \* \*

III. The interest of New York in protecting its institutions and the finality of its judicial authority vastly outweighs any interest in Vermont concerning this particular divorce.

a. New York must maintain the integrity of its appeal requirements. Vermont may not relieve Plaintiff-Appellee of the burden of providing a trial transcript and showing abuse of discretion in New York.

b. New York must protect its authority to modify and correct its own judgments.

c. Plaintiff-Appellee openly seeks the same "remarriage" he sought in New York. Such "remarriage," denied him in New York, will, if it occurs, be bigamous there.

\* \* \*

V. The lower Court has erred against the Full Faith and Credit clause, Article 4, section 1, of the Constitution of the United States.

a. The Court's assertion that a judgment cannot speak to facts which postdate it does not make sense, especially when the Court does so itself, declaring that "any reconciliation is almost inconceivable."

b. It is the nature and legal requirement of divorce on irreconcilable separation that the Court make a prediction about future facts. If the Court cannot speak to such future facts then "irreconcilable separation" could never be found, and the ground itself evaporates.

c. In actuality, the New York Court made exactly the same prediction as the lower Vermont Court, finding that Plaintiff-Appellee left Defendant-Appellant "never to return." The fact that Plaintiff-Appellee has indeed not returned, and maintains, as ever, that he never will, keeps the situation entirely *within* the findings and judgment of New York. Plaintiff-Appellee cannot split the issue "never", which he himself voluntarily submitted to New York in its entirety.

d. Plaintiff-Appellee would have to reconcile in good faith with Defendant-Appellant, for a substantial period of renewed marital relations, before some subsequent separation could arguably freshen the issue.

e. Defendant has acquired a Federal Constitutional right in the New York judgment. Vermont state power cannot be exercised to circumvent that right.

1. Plaintiff cannot go "forum-shopping" upon this issue.

2. Local policy must give way.

f. The lower Court erred in requiring the issue of irreconcilable separation to be relitigated, and erred again in entering a judgment vacating New York's upon identical finding.

1. The Lower Court erred in entertaining all of the following matters, because Plaintiff-Appellee submitted them all to trial in New York:

(a) Plaintiff-Appellee's relationship with Kathy Chamberlain and his wish to marry her;

(b) Defendant-Appellant's relationship with Peter Buknatski

(c) Change of title on the parties' Long Island and Hardwick properties, and Defendant-Appellant's move to Vermont, as alleged indications of agreement to separate.

Although these matters do not show in the New York documents now available, Plaintiff has not denied that he tried them; any such denial is barred by his laches and the destruction of the New York stenographer's notes by which they would be shown.

\* \* \*

VII. 15 VSA 592 is unconstitutional in operation and effect when the out-state resident Plaintiff is the economically advantaged party and the party at fault, and must be severed in such instance under 1 VSA 215.

a. Vermont has no jurisdiction to enforce alimony upon such party, as the lower Court itself noted.

b. In such instance, 15 VSA 592 creates an arbitrarily discriminatory subclassification among Vermont resident parties to divorce action, such that those with Vermont resident spouses have enforceable alimony available to them upon merit and equity, while those with spouses residing and employed out-of-state do not.

1. Such subclassification bears no relation to the purpose of 15 VSA 592 amended, and serves no state purpose whatsoever.

2. It creates a distinct disadvantage in their Vermont residency for one group of citizens, through no fault of their own, and deprives them of the remedy at law guaranteed to all by Article 4 of the Vermont Constitution.

3. It violates the Equal Protection provisions of the Vermont and United States Constitutions.

\* \* \*

IX. Other errors of the lower Court include the following:

a. The Court gave every appearance of partiality in favor of Plaintiff-Appellee.

b. The Court did not grant hearing of Defendant-Appellant's Affirmative Defense prior to trial on the permits, as requested in my Answer and provided by rule.

c. The Court permitted no hearing of Affirmative Defense at all.

d. The Court provided no reasoning for its rejection of most of my Affirmative Defenses, giving me no guidance towards appeal.

e. The Court did not permit time for memoranda of law, as noticed accompanying my Answer, and despite the direction of the Court in S98-87 CaF that Plaintiff-Appellee and I so address the question of res judicata in particular.



f. The Court gave no requested hearings on several motions, and no reasoning in denial of the motions.

g. The Court denied Defendant-Appellant's motion for continuance reasonably based on surprise, absence of evidence, and pendency of discovery and memorandum of law.

\* \* \*

j. The Court declined to grant sufficient time for trial, requiring priority of hearing the marital merits to the exclusion of affirmative defenses.

k. The Court inconsistently excluded evidence and testimony on Plaintiff-Appellees continuing political affiliations, subsequently finding those affiliations material to the marital issues but confining them to the past.

l. The Court, granting divorce on its finding that "reconciliation is almost inconceivable," has failed to take New York's finding, that Plaintiff left Defendant "never to return," in the light most favorable to the prevailing party. Such light clearly shows desertion and fraud.

\* \* \*

NOTICE OF CONSTITUTIONAL QUESTIONS, filed  
March 6, 1989

(Caption Omitted In Printing)

Defendant-Appellant pro se respectfully notices the Court of questions raised in her appeal under Article 4, sections 1 and 2, and Amendments 1 and 14 of the Constitution of the United States; . . .



Such questions may apply to 15 VSA 551 (7), 15 VSA 592 (amended), 15 VSA 751, 752, 785 and 787, and VRCP 80(d), as well as to other statutes and rules.

\* \* \*

MOTION TO STAY DIVORCE DECREE PENDING  
APPEAL, filed March 6, 1989

(Caption Omitted In Printing)

\* \* \*

I. This case, superficially concerning the dissolution of a marriage, is really about the dissolution of the final Judgment of a Sister State, New York, rendered in 1980, and the utilization of the 1981 amendment of 15 VSA 592 to that end, in violation of 1 VSA 214(b).

A. Plaintiff-Appellee brought action for divorce against this Defendant by personal service upon her in New York's Port Authority bus terminal in December, 1978. Uncertified copies of relevant documents in this action, NY Index #35892-79, Supreme Court, County and State of New York, are attached. Exemplified copies, certified pursuant to 28 USCS 1738, have been filed and admitted in Superior Court.

B. At the time of Plaintiff's New York action, Defendant was a resident of Vermont, and had been since fall of 1974, about 6 months after Plaintiff's desertion in New York.

C. Plaintiff-Appellee broadened his New York pleadings and tried his action on the theory of irreconcilable separation, alleging as well Defendant's agreement to separate despite her refusal to sign the separation

agreement he offered. When divorce was denied, Plaintiff filed appeal on precisely the issue of irreconcilable separation, but never perfected his appeal, rendering the judgment final.

D. The New York Court found that Plaintiff had indeed left Defendant "never to return." The Caledonia Superior Court, erroneously disregarding the commands of Full Faith and Credit, Article 4, section 1 of the Constitution of the United States, pleaded in Defendant's answer, has seen fit to make the very same finding – and thereupon to reverse the New York Judgment, with no change in circumstances.

\* \* \*

Plaintiff-Appellee has no guaranteed right to divorce. Defendant-Appellant *does* have a guaranteed Constitutional right to Full Faith and Credit, which right is not within the Court's discretion. It is to be hoped that our Public Policy in support of marriage has not deteriorated to the point where desertion and divorce are more highly valued institutions. It is certain that desertion and divorce are not to be more highly valued than the constitution.

\* \* \*

DEFENDANT-APPELLANT'S AFFIDAVIT IN SUPPORT  
OF MOTION FOR STAY OF DIVORCE DECREE, filed  
March 6, 1989

(Caption Omitted In Printing)

\* \* \*

Exemplified copies of documents in NY Divorce Action Index #35892-79, certified pursuant to 28 USCS 1738, have been filed and admitted in Caledonia Superior Court. Defendant-Appellant attaches uncertified copies as her offer of proof.

\* \* \*

APPELLANT'S RESPONSE TO APPELLEE'S MEMORANDUM IN OPPOSITION TO A STAY, filed March 21, 1989

(Caption Omitted In Printing)

\* \* \*

(page 2-6): Finally, however "clear" Plaintiff-Appellee's ground of "irreconcilable separation may be, to Judge Katz or anyone else, it is res judicata by the prior trial, findings, and judgment of New York, which are entitled to Full Faith and Credit, despite any contrary Vermont policy; *Johnson v. Muelberger*, 340 US 581; *Magnolia Petroleum Company v. Hunt*, 320 US 430; *William v. North Carolina*, 317 US 287 and 325 US 226; *Estin v. Estin*, 334 US 541; *Sherrer v. Sherrer*, 334 US 343.

Res judicata, estoppel, and Full Faith and Credit are among the most absolutely fundamental principles of our law, and social peace and repose under the law.

\* \* \*

Vermont lacks jurisdiction to reverse New York's judgment upon New York's own finding that Plaintiff left Defendant "never to return," which is the basic circumstance that Plaintiff-Appellee now asserts again; . . . *Pennoyer v. Neff*, 95 US 714: . . .

\* \* \*

The grounds, issues and facts in *Zweig v. Zweig* should never have been relitigated; *Johnson Company v. Wharton*, 152 US 252; *Riley et al. v. New York Trust Company*, 315 US 343; *Baldwin v. Iowa State Traveling Men's Association*, 283 US 522; . . .

\* \* \*

Plaintiff-Appellee filed appeal in New York charging error precisely on the issue of irreconcilable separation, but then abandoned his appeal, rendering the judgment final. Relitigation is barred even if the prior Court's decision was erroneous; *Reed, et al, v. Allen*, 286 US 191; . . . and especially when the aggrieved party has failed to appeal; *Ackerman v. US*, 340 US 193; *Aldrich v. Aldrich, et al*, 378 US 540 (divorce); *United States v. Throckmorton*, 98 US 61; *Hunt v. Hunt*, 72 NY 217; *D'Auria v. D'Auria*, 103 NYS 2d 741.

\* \* \*

New York has frequently granted divorce precisely on the point of "dead marriage" where cruelty, abandonment, and separation were the grounds asserted; *Newmann v. Newmann*, 55 AD 2d 822; 390 NYS 2d 300 4th Dept. 1976; *Bishop v. Bishop*, 62 Misc. 2d 436, 308 NYS 2d 998, 1970; *Berlin v. Berlin*, 314 NYS 2d 911, aff'd 29 AD 2d 840, 277 NE 2d 786, and others. This is why Plaintiff-Appellee appropriately tried his New York case on the theory of "dead marriage" (irreconcilable separation) and appealed on that very issue.

His "separation" is openly pleaded as a first and second cause of action in his New York Amended Complaint, #'s 1, 2, 7, 15, 16, 20, 21, and 22. At trial he pleaded in addition my alleged agreement to separate, under NY DRL 170(6), based on our property arrangements and my move to Vermont. The findings of New York's Justice Blangiardo, page 3, paragraph 5, show that the cause of action of Plaintiff's separation "never to return" was before the Court, heard and determined, and obviously material in the Court's view and in Plaintiff-Appellee's, since he not only pleaded it but also cited it as his ground of appeal.

"What is meant by the same cause of action is, where the same evidence will support both actions, although the actions may happen to be grounded in different writs."

*Kitchen v. Campbell*, 3 Wils. 304

Plaintiff-Appellee's Vermont grounds meet the criteria of *res judicata* and same cause of action as enumerated by all authority I have discovered; 65 HLR p. 824; 24 AmJ 2d 179; 27A CJS 262-264; 24 AmJ 2d 1103; 46 AmJ 2d 395 and 406; *State of Oklahoma v. State of Texas, United States, Intervener*, 256 US 70, 92, and numerous other cases to be briefed. The issues are within the scope of the New York pleadings as recognized there. All operative facts are the same. . . . The unappealed New York judgment is jurisdictionally unquestioned, final, conclusive, and binding everywhere. The lower Vermont Court's decision certainly infringes on my rights as established by the New York judgment, including pension rights. Full Faith and Credit, immunity from 15 VSA 592 amended under 1 VSA 214, my right to remedy-at-law, divorce, and enforceable

alimony should I decide to bring action for Plaintiff's fault in desertion, and, most especially, my adjudicated right to our marriage itself.

The lower Vermont Court has *not* found or concluded that the causes of action here and in New York are different. But even if they were, Plaintiff-Appellee is collaterally estopped from relitigating every issue he has submitted in the present case, because all were tried, at his instance, in New York, VRCP 15(b); 28 AmJ 2d 75; 46 AmJ 2d 395, 404 and 406; 65 HLR p. 824, citing Restatement of Judgments, secs. 47-8; 24 AmJ 2d 456 and 1103; *Tait v. Western Maryland Railroad Company*, 289 US 620, and numerous other authorities.

Plaintiff-Appellee is barred by his laches concerning his New York appeal, and the consequent destruction of the record there, from asserting that any of the present matters were not heard prior, and indeed has not attempted any such assertion. In *Zweig v. Zweig*, estoppel of these issues has exactly the same effect as *res judicata*. Plaintiff-Appellee's cause of action, and all its evidence, disappears, because he has raised nothing new.

Plaintiff-Appellee and the lower Court essentially stand on passage of time as the factor invalidating the New York judgment and the Full Faith and Credit attaching to it. I have already pointed out that New York encompassed all future time in finding that Plaintiff left me "never to return". Authority denies Plaintiff-Appellee any right to split his cause of action:

The whole tendency of our decision under the Full Faith and Credit clause is to require a Plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his



claim and *a fortiori* he cannot divide the grounds of recovery.

*Magnolia Petroleum Company v. Hunt*, 320 US 430, quoting *US v. California & Oregon Land Company*, 192 US 355

See also; *US v. Throckmorton*, 98 US 61; *Southern Pacific Railroad v. US*, 168 US 1; . . . "Separation" grounds, even if they are "continuous" to first trial, are no longer so after final judgment, and, unless there has been intervening reconciliation and a second "separation," cannot be tried again.

The lower court's assertion that my affirmative defenses are "wholly lacking in merit" is clearly erroneous. The Court abused its discretion, and the rules, by refusing to permit the parties to submit memoranda of law; by denying hearing of the affirmative defenses prior to trial on the merits, and by denying hearing of the affirmative defenses at trial. There has been no hearing of them at all, in violation of the specific instruction of the same Court by Judge Alan Meaker, in S98-87 CaF, that the parties address *res judicata* in particular with showings of authority. Plaintiff-Appellee has made none, and still does not in his present Memorandum in Opposition. I cited several authorities in my Answer (with many more assembled for a Memorandum of Law) but all met with deafening silence from Plaintiff-Appellee and from the lower Court as to particulars of reasoning.

Plaintiff-Appellee has raised below only three points against my affirmative defenses: alleged difference of grounds; "continuousness", and passage of time. These are without merit and easily disposed of under the authorities already cited, and others to be briefed.

\* \* \*



(pages 8-9):

In marriage I hope for more, for my husband and me and for all families. Few institutions are more basic to society and human need. If the Courts sustain plain desertion as sufficient to end a marriage, then the institution itself disappears. If "far too many marriages fail" then the line against willfull desertion must be drawn, as New York has done - see also *Ryan v. Ryan*, 277 So. 2d 266. This Plaintiff-Appellee has, since 1973, rejected any impulse, effort, or possibility towards staying together, poor precedent indeed for encouraging spouses to work out their problems, in marital responsibility. This divorce, if upheld, announces to society that marital effort and responsibility are no longer of any importance.

\* \* \*

MOTION FOR ENLARGEMENT OF TIME FOR SUBMISSION OF BRIEF . . . filed May 21, 1989

(Caption Omitted In Printing)

\* \* \*

C. Without the notice of issues and authorities in Plaintiff-Appellee's docketing materials, I am severely disadvantaged in my attempt to compose a brief, since neither Mr. Rubin nor the lower Court offered particular reasoning or authority against most of the 75 points of my Answer, which covered various legal aspects of eleven affirmative defenses.

\* \* \*

II. . . .

B. Mr. Rubin has known from the beginning that res judicata and collateral estoppel (and, obviously, Full Faith

and Credit) are involved, and that there would be an appeal: Transcript of hearing in S98-87 CaF, before the Honorable Judge John Meaker, 2/17/88, page 3, lines 22-25 and page 4, lines 23-25, attached. Depending on one's interpretation of the word "briefs," Mr. Rubin, at page 10, lines 4-6, attached, appears to have adopted a strategy of withholding his arguments in law until appeal, "when the briefs are written." After his brief, I will have only 10 days to research and write a reply. So Judge Meaker explicitly ruled, page 13, lines 15-20 and page 14, lines 8-11, attached, that both parties were directed to submit law on those issues to the Superior Court. Plaintiff-Appellee never did so. I tried hard to, submitting my lengthy and complicated Answer within time ten days after the Supreme Court refused me permission for interlocutory appeal, on December 9, with a letter to the Court, attached, that I would submit my Memorandum of Law after the Christmas-New Year's holidays with my family. The Court responded by notifying me on December 22 of Final Hearing on January 6. My Motion for Continuance was denied. I applied repeatedly to have the affirmative defenses heard first, as provided by VRCP 12(d), or heard later, which the Court repeatedly denied: Transcript of trial in S51-88, before the Honorable Judge Matthew Katz, 1/6/89, page 9, lines 22-25; page 10, lines 1-2; page 32, lines 15-21; page 36, lines 1-4; page 57, lines 13-25; page 58 lines, 1-11 and 18-21; page 65, lines 16-25; page 66; page 67, lines 1-5 and 10-15; page 73, lines 20-25; page 74, lines 1-14; page 75, lines 1-9, all attached. The bottom line was, that without ever hearing any legal argument on the affirmative defenses, the lower Court ruled the prior New York

divorce judgment between the parties irrelevant. Then, since it was irrelevant, law concerning its significance didn't have to be heard!

. . . Thus, neither Plaintiff-Appellee nor the lower Court has ever addressed law applicable to the New York judgment as directed by Judge Meaker. As in *Auger v. Auger*, 149 Vt. 559, 1988, this same Judge has again left testimony undeveloped and "interfer(ed) with the opportunity of adversaries to make their cases as strong as possible and . . . give the trier of fact . . . the chance to see the full strength of each competing position."

C. I appear pro se, The Vermont Supreme Court has ruled in *Block v. Angney*, 149 Vt. 29, and *Town of Westminster v. Hall*, 139 Vt. 248 (quoting *Harmon v. Superior Court*, 307 F 2d 796), that parties pro se may not be denied hearing, or the opportunity to present oral or written argument, even if the case appears weak or lacking in merit. In *Miller v. Miller*, 83-556, 5/10/85, citing *Vahlteich v. Knott*, 139 Vt. 590, this Court reversed and remanded where the pro se party had repeatedly sought to present evidence, rebuffed by the Court until the Court declared that the time for the evidence had passed. As directed by Judge Meaker, I sought to present arguments in law as well as evidence, not only to express my own position, but equally to elicit from Plaintiff's attorney and from the Court notice of opposing argument and authority critical for appeal. In *Armstrong v. Manzo et ux*, 380 US 545, citing *Grannis v. Ordean*, 234 US 385, the United States Supreme Court held that the due process "opportunity to be heard . . . is an opportunity which must be granted at a meaningful time and in a meaningful manner." Although no docketing materials at this time will provide me with

conclusions of the lower Court on the theories I raised in my Answer, it remains critical to focus on Plaintiff-Appellee's theories and authorities. The lower Court ruled, essentially, that the New York judgment is irrelevant on any issue, whether determined therein or not, because we are in a different time and place. Since the whole point of res judicata, collateral estoppel, and Full Faith and Credit is to sustain final judgments intact against changes of time and place, and even against hostile policies, I am utterly mystified.

\* \* \*

APPELLEE'S DOCKETING STATEMENT, filed June 6, 1989

(Caption Omitted In Printing)

\* \* \*

III. The appellee does not understand the issue raised by the appellant in Paragraph III.

\* \* \*

V. The New York judgment in 1980 relates to facts as of the date of that judgment. Facts existing subsequent thereto give rise to a new cause of action in Vermont. Full faith and credit is not applicable.

\* \* \*

VII. . . . Any alimony awarded to her in Vermont is enforceable in New York Courts. Her argument of a denial of equal protection is not comprehended by the appellee.

\* \* \*

Brief of the Appellant, July 31, 1989, excerpts:

(Caption Omitted In Printing)

\* \* \*

#### STATEMENT OF CASE - CLAIMS OF ERROR

Plaintiff-Appellee husband seeks divorce from me on ground of irreconcilable separation under 15 VSA 551(7). The claimed "separation" took place in spring, 1974, when Plaintiff-Appellee willfully deserted me and our daughter at Mr. Sinai, New York, on Long Island.

This is Plaintiff-Appellee's third divorce action against me upon the same situation and issues. His first was Divorce Action Index #35892-79, Supreme Court, New York County, State of New York, PC 200-237. Plaintiff argued therein the issue of irreconcilable separation, which is specifically included in the broad discretionary powers of the divorce courts of New York under the grounds he nominally alleged. The New York court found as fact Plaintiff's contention that he had left me and our daughter six years earlier "never to return," PC 219, paragraph 5. The court also determined, PC 222, paragraph 5, that the "diagnosis" of irreconcilable separation - "dead marriage," for short - was not warranted. The decision also severed the issues of custody and support from the marital issues by stipulation of the parties. They were to be resolved later, if it was necessary, by "this court."

Plaintiff filed appeal in New York, charging in particular that the lower court had failed to give sufficient consideration and weight to the "dead marriage doctrine," PC 231, #8. But he never perfected his appeal, and so the New York decision is final. Defendant-Appellant insists that Full Faith and Credit be accorded by Vermont to the New York decision, such that it has the same effect here that it does in New York, where Plaintiff still resides.

\* \* \*

Shortly after he left us he brought me a separation agreement, drawn by his attorney, pursuant to "no-fault" divorce under New York's Domestic Relations Law 170 (6), PC 161. I refused to sign because the "separation" was, and is, against my will and conviction.

\* \* \*

In December, 1978, Michael asked me to bring Sierra to New York for a holiday visit with him. At the bus station, I was served with his summons and complaint for divorce. I engaged the first attorney I could within 20 days, and, against his initial advice, decided that I did not want a divorce because it went against my heart. Trial lasted about 9 days; Plaintiff presented 7 witnesses, including several of his political associates. Every single matter raised in the present case was thoroughly discussed at that trial.

\* \* \*

In July, 1987, just one month after the second Gabel decision (PC 70) finalized economic matters favorably to Plaintiff-Appellee, he filed for divorce against me here in



Vermont, in S98-87 CaF, PC 5. Since I cannot touch Sierra's college money, I have had to proceed pro se.

The S98-87 CaF court granted my motion for involuntary dismissal, without prejudice, on 2/17/88, because Plaintiff-Appellee had not filed any documentation of the New York action under VRCP 80(b). . . . The S98-87 court also directed the parties to address the issue of res judicata from New York with supporting law for the benefit of the lower court in the case to come, S98-87T 13/15-20; 14/8-11, because Plaintiff had indicated his intent to withhold law on that subject until "the briefs are written," 10/3-6.

Plaintiff filed S51-88 CaF on 4/5/88, complaint dated 2/26/88, with personal service on me 3/28/88.

\* \* \*

I filed special appearance, PC 76, and in my original and amended Motions to Dismiss, PC 77-84, 91-94, contested the court's jurisdiction on the basis of defective documentation of the New York action and S98-87 CaF; finality of New York's exercised jurisdiction over the issues raised, arbitrary classifications "Plaintiff" and "Defendant" contrary to the fact of "Plaintiff's" willful desertion; retroactive effect of the 1981 amendment of 15 VSA 592 prohibited under 1 VSA 214; and New York's jurisdiction res judicata.

Plaintiff-Appellee . . . cited a few authorities on residency, including some US Supreme Court cases which in fact sustain the jurisdiction of New York rather than Vermont, and require Full Faith and Credit to the New York decision. Plaintiff asserted that the New York



grounds are nominally different, but acknowledged, PC 100, that the issue of irreconcilable separation was tried and determined in New York. He says this doesn't matter because irreconcilable separation is transitory and continuous, but so far has submitted no argument or authority suggesting that these characteristics operate after final judgment on the same situation and issue in a sister State. He asserted that this question is "properly left for resolution after presentation of evidence at trial," against Honorable Judge Meaker's specific direction in S98-87 CaF, which is *res judicata* on the point of when affirmative defenses should have been heard. Finally, Plaintiff asserted that 1 VSA 214 "does not apply" to the amendment of 15 VSA 592, but gave no reasoning or authority.

At hearing on the Motion to Dismiss I added that, in this case, 15 VSA 592 amended deprives me of equal protection of the law under the 14th Amendment of the US Constitution, because Vermont law and jurisdiction cannot afford me the protection and remedy of 15 VSA 785-787 afforded parties whose spouses live here, MDT 22/12-24/24. The lower court erred in denying the Motion to dismiss. . . . without any comment on Equal Protection.

\* \* \*

I, of course, considered Discovery irrelevant at that point because I believed, as I still do, that Vermont has no jurisdiction to enforce alimony. . . .

Ten diligent days later I filed my Answer . . .

I asserted Full Faith and Credit at various points throughout. At PC 137 #4 I asked the affirmative defenses

to be heard first, as required under VRCP 12(d) unless the court orders them deferred. The court did not so order at MDT 32/5-22, and appeared, in fact to grant the request, asking only when I would have the exemplified New York documents ready.

The letter accompanying my Answer, PC 183, noticed, for purposes of scheduling, that I would submit a Memorandum of Law and Interrogatories after the Christmas holidays, and noticed again that hearing of the affirmative defenses should happen first. Upon receipt of the Bar Docket for the term commencing 12/5, I had noted *Zweig* at #51, and an attorney advised me that a case so numbered would be heard sometime in spring, so I turned my attention to holiday vacation plans with my family.

On 12/22 I received the weekly calendar scheduling trial on 1/6/89, only 15 days later, those days comprising my family holidays. I called the clerk, who told me that when she showed Honorable Judge Katz my Answer and my letter, he ordered the early date, and would not be available until 1/3, Affidavit, PC 180-182. I wrote the court again on Christmas Eve, noticing that I would move for Continuance, so that the court could consider scheduling alternatives, PC 184. I submitted evidence, PC 185, 186 showing that I had ordered prepaid the exemplified New York documentation, not yet received, in that Motion, PC 170-186, at 185-186. I asserted pendency of Discovery at 171 f, surprise at 170 #3, unpreparedness for trial at 170 #3 d, and absence of the exemplified evidence essential under 28 USC s. 1738 at 170-171 #3 e. I asked again that my affirmative defenses be heard first, and for opportunity to prepare a Memorandum of Law to that

end, 171 h. All of these are grounds for continuance under VRCP 40 and VRCP 15(a), and at PC 177-178 g I asserted the appearance of prejudice in the scheduling. The court denied my Motion for Continuance without comment at PC 187.

At the opening of trial the court declared its "expectation," at the time of the Motion to Dismiss, to hold the New York action "irrelevant," S51-88TT 3/19-4/8. At 18/20-24, immediately after Plaintiff-Appellee's testimony on direct, the court already knew who would be appealing, and therefore had already decided to grant divorce. The court indicated from time to time that I would be permitted to argue my affirmative defenses at some point, just not at any of the points when I asked to do so (S51-88TT 9/14-10/2; 32/3-34/4; 35/11-12; 35/12-36/5; 57/13-16; 57/23-58/21; 66/4-67/5), and finally, at 73/20-74/3, 74/9-14, and 75/1-10, that I could not present them at all. The court acknowledged outright that I *was* being cut off from "expounding" because the court already considered the defenses "insufficient." Prejudice before hearing, and prejudice as the explicit basis to *deny* hearing, could not possibly be clearer. It is reversible error under *Auger v. Auger*, 149 Vt. 559; *Miller v. Miller*, 83-556, 5/10/85; *Block v. Angney*, 149 Vt. 29, and *Town of Westminster v. Hall*, 139 Vt. 248, quoting *Harmon v. Superior Court*, 307 F. 2d 796, The Decree, PC 266, is void for stating "This matter was heard . . ."

The lower court based its view that the New York action is "irrelevant" entirely on passage of time and change of jurisdiction. But it is the entire *purpose* of Full Faith and Credit, *res judicata*, and collateral estoppel to

*protect* final judgments absolutely against those very factors when the identical situation and issues have been tried and decided in a sister State. When the exemplified documents from New York arrived, on 1/12/89, I moved for their admission and judicial notice, PC 198-199. The court never ruled at all until 1/31, PC 269, and then grudgingly, prompted only by my letter of 1/27, PC 268. The court erroneously holds that "Of course, they do not change the result," against Full Faith and Credit and 28 USC s. 1738.

In my post-trial motions I continued to seek leave for a Memorandum of Law and hearing of the affirmative defenses: PC 240, paragraph 1; PC 242-243, B, H – but the court denied those motions without hearing at PC 264-265, and without comment upon affirmative defenses, Memoranda of Law, or the requirement from S98-87CaF, PC 242-243, B. 2. The denial of affirmative defenses and Memoranda of Law violates the S98-87 CaF decision, VRCP 15(a), and due process, and is erroneous under *Bevins v. King*, 143 Vt. 252 and *Block v. Angney*, 149 Vt. 29, 32.

\* \* \*

... the court's refusal to render specific findings and conclusions on each of the theories presented in my Answer, PC 196-197 H, renders those findings and conclusions "totally inadequate" ...

\* \* \*

The court's findings of fact do not support its conclusions of law.

\* \* \*

Findings #1, 2, 3, 4, 7, 8 and 9 all support res judicata, collateral estoppel, and Full Faith and Credit to the decision of New York.

The conclusions of law, PC 195-197 err as follows:

\* \* \*

- D. "The parties" have not lived separate and apart; willfull desertion is found at findings #3, 4
- E. is res judicata from New York, and divorce *denied* upon it
- F. totally repudiates Full Faith and Credit, res judicata and collateral estoppel; misapprehension of New York's decision, which does *not* posit possibility of reconciliation but finds, on the contrary, that Plaintiff left us "never to return"
- G. 1 VSA 213 and 214 prohibit application of 15 VSA 592 amended; New York not only had jurisdiction, it *exercised* it, over the whole situation and every issue now involved. Plaintiff appealed there specifically on the issue of irreconcilable separation, and failed to perfect his appeal.

\* \* \*

The lower court's conclusions at PC 197 J, PC 264-265, and PC 266, #2, regarding alimony and property, are so manifestly unjust, so contrary to its own findings and the uncontradicted testimony and evidence, so contrary to 15 VSA 751 and 752, and so contrary to the case precedents, that I am led inexorably to the view that the denial of alimony and property compensation was arrived at in an effort to forestall my argument on inherent jurisdictional denial of equal protection of the laws due to Plaintiff-Appellee's residence and employment in New York, beyond the reach of 15 VSA 785-787.

\* \* \*

I do not seek remand on all this alimony and property injustice, and I brief it only to indicate that the error is so huge, and so distorted, that it can only have been meant to deny alimony in order to undercut the question of Equal Protection. Under *Orr v. Orr*, 440 US 268, however, the denial of alimony is irrelevant to the Equal Protection claim I raise.

\* \* \*

#### ISSUES PRESENTED FOR REVIEW

- I. Full Faith and Credit owed to decision of New York by principles priority and finality, especially since Plaintiff filed and abandoned appeal; same effect in Vermont as in New York, any hostile local policy must give way;
- II. Res judicata, same cause of action, materiality and necessity of the irreconcilable separation issue, tried on that theory, law of the case, collateral estoppel, conclusiveness;
- III. New York jurisdiction unquestioned, presumed, and documented;
- IV. Full Faith and Credit to New York divorce *statute*, New York's superior interest
- V. Passage of time, irrelevant to finality of New York decision and Full Faith and Credit. Instead, laches in Plaintiff-Appellee, with Defendant-Appellant's detrimental reliance economically and legally. Effect of New York decision severing economic from marital issues by stipulation, that stipulation a contract, Plaintiff-Appellee accepting the benefits thereof is bound by the *entire* decision; evidence destroyed . . .



\* \* \*

- VII. Effect of 15 VSA 592 amended barred from *Zweig* under 1 VSA 213, 214; cause of action accrued prior to amendment, bar prior to amendment accrued as right to Defendant-Appellant, lost rights, new liabilities;

\* \* \*

- IX. Want of jurisdiction in Vermont under Equal Protection of the Laws, remedies and protections of 15 VSA 785-787 not available to Defendant-Appellant, alimony denied to avoid this question, but question not avoided thereby;
- X. Canons of construction, harmony with US and Vermont Constitutions, no unjust effect, severance under 1 VSA 215;
- XI. Abuses by the court below, including:  
Denial of continuance for Memorandum of Law, Affirmative Defenses not allowed to be heard because the court had already decided they were irrelevant and without merit, denial of due process, prejudice; violation of prior decision in S98-87 CaF; Abuse of scheduling and notice;

\* \* \*

Inadequate findings, refusal to rule with particularity on theories presented in Answer;

Conclusions not supported by findings;

Manifest injustice in denial of alimony under case precedents, warranting conclusion alimony denied in order to try to avoid Equal Protection challenge;

\* \* \*



## SUMMARY

The lower court has erroneously denied all Faith and Credit to the prior decision of New York. Pleadings in all three cases show the same cause of action, Plaintiff-Appellee's "separation" from me and our home in spring, 1974. At trial in New York Plaintiff broadened his written pleadings to assert his firm determination "never to return" - because New York explicitly includes irreconcilable separation (the "dead marriage doctrine") within its broad discretion on the grounds he presented. The case was tried and determined on that theory. New York declared that Plaintiff had indeed left "never to return," but held the "dead marriage diagnosis" unwarranted nevertheless, because my disagreement with that diagnosis convinced the court, PC 219, paragraph 5; PC 222, paragraph 2. The S51-88 CaF court still finds my disagreement credible, S51-88TT 26/24-27/17, 65/5-6. The only difference is that the lower Vermont court unconstitutionally gives itself the authority now to hold my view unavailing. It substitutes its own judgment for New York's final judgment, upon the same facts.

The lower court profoundly misapprehends the New York decision, suggesting, PC 196 F, that New York held out some possibility of reconciliation - which possibility a later court might find no longer in existence. But New York did *not* allow any such possibility. It found that Michael had left "never to return," and based its decision not on any view that he might, but on my convincing rejection of the irreconcilable separation diagnosis. This decision must be construed in my favor, as prevailing party. In effect, and by necessary implication, it holds that willfull desertion does *not* show irreconcilable separation.

Even if, as the lower court asserts, S51-88TT 35/12-13, 22-25, Vermont law "entitled" Plaintiff-Appellee to divorce based on his own willfull desertion, we would then have only a "hostile policy" between New York and Vermont. And the whole point of Full Faith and Credit is that foreign States may *not* overturn or modify the final judgments of sister States as to marital status on ground of differing policy in the forum.

\* \* \*

I find no authority, and Plaintiff-Appellee has so far asserted none, that sustains a "continuous" cause of action *after* final judgment thereon. I do find authority, particularly *Harding v. Harding*, 198 US 317, a divorce case on Full Faith and Credit, to the contrary. Since New York found that Plaintiff left "never to return," the fact that he has not returned, in 1989, and is still determined not to, is merely cumulative evidence, fully comprehended in the sphere of the New York decision. The view of the lower court, that New York's judgment was "final" only up to the date of its rendition, PC 196 F, MDT 15/10-17, erroneously destroys the entire meaning of finality, such that the judgment of a sister State has less authority and effect than a dog license. Final judgment means that the issues decided are decided with binding and conclusive force. They cannot be questioned or relitigated anywhere, ever again. Finality of decision in this sense is essential to judicial authority and the peace of society. Full Faith and Credit guarantees me *repose* in the New York decision; time passing in such repose cannot possibly, of itself, accrue as a new cause of action against me.

Full Faith and Credit requires that the New York decision shall have the same effect in Vermont that it has in New York. In New York, Plaintiff filed appeal on the very issue of irreconcilable separation, PC 231, #8. His selection of this particular issue shows just how "material" and "necessary" he and his attorney considered it to be. He failed to perfect his appeal, and neither Plaintiff-Appellee nor the lower court has ever addressed the effect of that abandoned appeal, which is fatal. If New York would find "passage of time" to be a factor qualifying the effect of its final, unappealed judgment, Plaintiff would certainly have sought relief there, long ago. Instead, the lower Vermont Court has magically relieved Plaintiff of his burdens in his home State.

Laches and Statute of Limitations both apply in *Zweig* because the cause of action ceased to be "continuous" upon judgment, and because of the destruction of the reporter's notes from the New York trial, PC 158. Loss of that transcript has been prejudicial to me in proof of the fact that Plaintiff's relationship with his present companion, his wish to marry her, and my relationship with my present companion were heard in New York, and should have been collaterally estopped. Michael also argued in New York that my participation in property and financial arrangements and my move to Vermont overcame my refusal to sign a separation agreement and brought him with NY DRL 170 (6), PC 161, and explicitly rejected the court's suggestion that he sue for separation, which could have brought him under DRL 170 (5). He pleaded comity and Full Faith and Credit to Vermont's 15 VSA 551 (7) as well.

. . .

Plaintiff-Appellee cannot accept and utilize those parts of the New York decision which favored him, and reject the parts that did not. The stipulation therein brings the entire decision under the protection of contract.

•     •     •

Apart from its lack of authority in rem under Full Faith and Credit, Vermont lacks jurisdiction. Under 1 VSA 213 and 214, the 1981 amendment of 15 VSA 592 granting the right of Vermont jurisdiction to non-resident divorce plaintiffs cannot affect either the finality of the New York case or the reservation of Vermont jurisdiction to me, as resident, upon a cause of action fully accrued to me prior to the change.

Vermont also lacks jurisdiction because, despite the dismissal of S98-87 CaF on exactly this point, Plaintiff-Appellee never fulfilled the requirements of VRCP 80(b), 79 and 44 with regard to properly certified documentation of the New York action. In fact, he specifically excluded from his submissions all data going to Full Faith and Credit, namely, showing of service of original process, PC 202; the decision, showing jurisdictional recitations and the issue of irreconcilable separation, PC 222 paragraph 2, PC 223-224; the Notice of Appeal, Pre-Argument Statement, and Acceptance by the Appellate Division, showing status of the issue of irreconcilable separation, PC 227-232; and nothing that he did submit was exemplified, PC 47, 48, 56, 28 USC s. 1738. I had to supply them all - . . .

\* \* \*

Finally, Vermont lacks jurisdiction in 15 VSA 592 amended, because it cannot afford me the protection and remedy-at-law of 15 VSA 785-787, which it does afford to other Vermont residents under similar circumstances relevant to the purpose of the law. Under *Orr v. Orr*, 440 US 268, the lower court's manifestly unjust denial of alimony to me in no way defeats my standing with regard to Equal Protection of the Laws, since that question arises prior to any actual determination. *Williams et al. v. Vermont, et al*, 472 US 14, specifically applied the 14th Amendment of the US Constitution against Vermont in the consequences of its residency classifications - with only \$172 at stake.

\* \* \*

#### CAUSE OF ACTION - THE SAME

The lower court erroneously holds the New York decision "irrelevant": MDT 10/12-14; S51-88TT 4/4-8; 4/15-16; 32/9; 32/15-33/1; 65/20-24; 66/22-67/18. The court declared as early as MDT 15/10-17 that "there is no law" supporting the contention that a decision denying divorce would foreclose the aggrieved party from bringing action again on the same situation. The law is Article IV, sections 1 and 2, of the US Constitution.

There is no such thing as an "irrelevant" prior judgment in a sister State having jurisdiction, between the same parties, seeking the same relief upon the same situation and state of facts. The rendition of judgment might have to meet certain tests, but it cannot be simply "irrelevant." Holding irrelevance, the lower court never

inquired into those tests, and has neither found nor concluded failure of any of them. Refusing amendment of pleadings for a Memorandum of Law (PC 171 h.; PC 177-178 #5; PC 183, paragraph 5; PC 187; PC 242-243 B; S51-88TT 7/4-19), and refusing hearing of affirmative defenses, PC 137 #4; PC 176 #4; PC 183 paragraph 5; PC 242-243 B; PC 264-265 (omission); MDT 32/3-21; S51-88 TT 9/14-10/2; 57/11-58/21; 66/4-67/5; 73/23-75/10), it did not permit me to show the tests satisfied.

The S98-87 CaF lower court, in the person of Honorable Judge Meaker, remarked on "the unseemly prospect of inconsistent judgments issuing from two different courts," S98-87T 26/2-10. Dismissing S98-87 CaF without prejudice, he specifically directed the parties, at 13/15-20 and 14/8-11, to address the question of res judicata with supporting law prior to the decision of the next lower court, because Plaintiff-Appellee's attorney, at 10/3-7, had already indicated his intention to withhold his authority on the law until "the briefs are written." Plaintiff's attorney never followed Judge Meaker's direction - though it is res judicata - and Honorable Judge Katz prevented me from doing so. . . .

Plaintiff-Appellee asserts nominal differences between the New York and Vermont causes of action, but also allows, at PC 100, paragraph 3, that irreconcilable separation was heard and determined in New York. In addition to the documents of decision and appeal there, the very same continuing 1974 "separation" alleged in S51-88 CaF appears as first and second causes of action in Plaintiff's New York complaints: PC 50, #1, 2; PC 51, #7, 8; PC 53, #13, 14, 16; PC 203, #1, 2; PC 204, #7; PC



205-206, #15, 16; PC 208, #20, 21; PC 209, #22. I counter-claimed the same facts, PC 212 #2, 3; PC 213 #6, 8; and PC 214 #11, that "plaintiff did . . . state that he would not return . . ." as he himself argued at trial, and as the New York court found.

*Slansky v. Slansky*, Vt. slip opinion 87-136, 9/30/88, p. 4, quotes approvingly from *Aubert v. Aubert*, 129 NH 422, 425-425:

"It is long-settled that a prior divorce decree acts as a bar to subsequent action for *divorce*, as to the same ground and every issue actually litigated . . ."

*Babcock v. Babcock*, 146 P.2d 279, distinguishes bar from collateral estoppel and holds bar, even though the causes of action were nominally different and one of them was "continuing". Mrs. Babcock, like plaintiff Zweig, had been denied a divorce on the cruelty ground, and was subsequently *barred* from suit on ground of desertion, because the situation of desertion had been *in existence* at the time of her cruelty suit.

*Harding v. Harding*, 198 US 317, uses both terms, *res judicata* and *estoppel*. The Court required Full Faith and Credit to prior judgment on no-fault separation. The unsuccessful husband asserted California's judgment subsequently granting him divorce for desertion. Not only are both grounds "continuing," but the desertion claim asserted a change of circumstances – that he had asked her to return and she had refused, so that the separation *became* a different cause, desertion. But the US Supreme Court reversed California:

" . . . conceding, without deciding, that the California law is as asserted, the proposition of



fact upon which the argument rests amounts simply to denying all effect to the Illinois decree . . . That the issue of willfull desertion present in the divorce action was identical with the issue of absence without fault . . . is manifest"

based on the *same dates* asserted for its beginning, and its continuous nature thereafter.

*Aubert v. Aubert*, cited, goes on to say, #4.

"A subsequent suit based upon the same cause of action is barred even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action (2) to seek remedies or forms of relief not demanded in the first action, since the term 'cause of action' for *res judicata* purposes collectively refers to all theories on which relief could be claimed on the basis of the factual transaction in question.

In *Zweig* the foundation facts are identical. All parties, attorneys, and courts involved agree that the present case *arises from* the same transaction and is *based on* the same cause of action in New York, and seeks the same relief. It is therefore *res judicata*. . . .

Differences in legal theory will not create a new and different cause of action: *Wursthaus, Inc. v. Cerreta*, 149 Vt. 54, #1, 56-57; *Fitzgerald v. Fitzgerald*, 144 Vt. 549, #4, 5; *Hubbell v. US*, 171 US 203, 209; *Reilly v. Reed*, 407 NYS 2d 64, #6; *Gowan v. Tulley*, 407 NYS 2d 650, 651. *McKee v. Martin*, 119 Vt. 177, 181, quotes *Kitchen v. Campbell*, 3 Wils. 304, that causes of action are the same where evidentiary facts are the same, "although the actions may happen to be grounded in different writs."

"The mere manipulation of grounds . . . does not result in multiplying the cause of action," *Baltimore Steamship Co. et al. v. Phillips*, 274 US 316, #2.

"The cause of action was one and indivisible, and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely on the plea of *res judicata* . . ."

*Baltimore* cites *Stark v. Starr*, 94 US 447:

"He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which . . . relief is sought, and leave the rest to be prosecuted in a second suit, if the first fail."

Other cases repudiating the use of "different grounds" to split the cause of action upon a single situation include, *US v. California and Oregon Land Co.*, 192 US 355; *Bienville Water Supply Co. v. Mobile*, 186 US 212, 216-217, and *Werlein v. New Orleans*, 177 US 390, 399-400.

\* \* \*

Under *US v. Utah Construction Co.*, 348 US 395, 395, 419, a party can't compel relitigation of a matter decided by using different language and a different theory, for the

"statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics."

In New York, the court's discretion to grant divorce on the cruelty ground is extremely broad, and specifically includes the "dead marriage" doctrine - a rather belittling term for irreconcilable separation in their parlane. *Hessen v. Hessen*, 33 NY 2d 406, 353 NYS 2d 421, and *Berlin v. Berlin*, 314 NYS 2d 911, 29 AD 2d 840, both

utilized the "dead marriage" factor, and both distinguished "well-being" from "health" and "improper" from "unsafe" cohabitation, though the former denied divorce, while the latter granted it. *Newmann v. Newmann*, 390 NYS 2d 300, 55 AD 2d 822, upheld a cruelty divorce granted to the husband on the basis of "dead marriage," and *Echeverria v. Echeverria*, 40 NY 2d 565, 386 NYS 2d 653, granted the cruelty divorce on appeal, for the same reason.

\* \* \*

*Bishop v. Bishop*, 308 NYS 2d 998, 62 Misc. 2d 436, granted divorce for cruelty holding that "questions of fault are irrelevant . . . where marriage is demonstrably no longer viable."

Plaintiff and his New York attorneys followed this line of authority in New York with good reason, because it provided him a "no-fault" alternative to NY DRL 170(6), which would look for the separation agreement that I didn't sign. Plaintiff failed, not because the issue of irreconcilable separation was unavailable to him or immaterial on the grounds he chose, but simply because that issue is discretionary. If he felt the discretion was withheld or abused, as he alleged in filing appeal, the higher court might indeed have agreed with him. But he did not perfect appeal, or shoulder his burden of showing abuse of discretion.

\* \* \*

*Low v. Mussey*, 41 Vt. 393, 396-397, requires Full Faith and Credit to the dismissal of a suit in a sister State.

"The pleas . . . in that case raised no questions but what related to the merits as recognized in the forum to which the orator applied for relief. Under such circumstances, error of law or mistakes of fact cannot be shown for the purpose of qualifying its effect, as the domestic tribunal will not review the adjudication of a sister state where the record of judgment or decree is regular in form and contains . . . the essential elements of a judicial decision of the same matter."

\* \* \*

Zweig meets all the tests of *res judicata* in *Chicot County Dist. v. Bank*, 308 US 371, 375, and *State of Oklahoma v. State of Texas, US, Intervener*, 256 US 70, 92, especially since irreconcilable separation was within the issues made by Plaintiff's New York pleadings, was so recognized by both parties and the court, was introduced, discussed, argued, directly determined, and referred to in the court's opinion.

If the New York court had considered irreconcilable separation an immaterial or unnecessary issue, it could just as easily have said so while it was denying divorce. Instead, it ruled against that diagnosis as fact. The judgment, PC 223, records that I denied "the material allegations of the complaint," among them the "dead marriage diagnosis," PC 222, paragraph 2. PC 224, paragraph 1, notes that "the issues of fact raised by the pleadings" were tried, and paragraph 3 holds that Plaintiff failed "in the proof to support his causes of action." Plaintiff, in his appeal, PC 231 #8, argues, not that "dead marriage" was immaterial or unnecessary, but that the lower court did not consider it sufficiently material and necessary. So he is estopped now from taking the inconsistent position that

that issue was not, or should not have been, material or necessary.

Since the New York court found Plaintiff's specific assertions of cruelty and abandonment either not credible or trivial, - which Plaintiff, of course, knew perfectly well ahead of time - irreconcilable separation was *the* crucially necessary issue. His only hope of giving weight to his charges lay in his assertions, PC 205-206, #16, and PC 208, #20, 21, that I caused him to "*remove himself from the marital home,*" after which his "symptoms ceased to exist." He could hardly have shown abandonment, or cohabitation "improper" or "unsafe", if he did not show that he had left.

\* \* \*

New York's finding that Plaintiff left "never to return" and that the "diagnosis" of irreconcilable separation is unwarranted, is merged in the judgment even if that finding was erroneously or improperly included:

"The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing, or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment." *Tait v. Western Maryland Railway Co.*, 289 US 620

*US v. Oregon Lumber Co., et al*, 260 US 290, makes the same point with regard to the doctrine of election of remedies - the US could not, after losing the prior case, urge that it had taken an erroneous view of the law, submitting a claim "by inappropriate action, upon which recovery could not be had."

\*     \*     \*

*Sherrer v. Sherrer*, 334 US 343, reversing to require Massachusetts' Full Faith and Credit to Florida's prior judgment in divorce action, noted that the unsuccessful party had amply had his "day in court."

The Vermont Supreme Court has repeatedly held that, in divorce as in other matters, Full Faith and Credit places a *heavy burden* on the party seeking to undermine the decree of a sister State: *Ford v. Franklin*, divorce, 129 Vt. 114, #1, 5; *Loeb v. Loeb*, 118 Vt. 472, #3, 4, 5, citing *Williams v. North Carolina*, 325 US 266 and *Esenwein v. Commonwealth*, 325 US 279, 280-281, divorce; *Wursthaus, Inc. v. Cerreta*, 149 Vt. 54, citing *Cook v. Cook*, 116 Vt. 374, 342 US 126, 128, 117 Vt. 173;. . . In declaring the New York judgment "irrelevant," the lower court has entirely absolved plaintiff of his burden, and has unconscionably shifted it to me, a violation of due process under *Armstrong v. Manzo et ux*, 380 US 545, 551, 552, involving divorce: quoting *Speiser v. Randall*, 357 US 513, 525, "For 'it is plain that where the burden of proof lies may be decisive of the outcome.' "

The New York decision establishes certain rights and interests, namely, that willfull desertion is not irreconcilable separation, and that there is no irreconcilable separation for us when I do not agree on the diagnosis. Causes of action are the same where a differing judgment in the second would destroy or impair rights or interest established by the first, 27A CJS 264; 46 AmJ 2d 406; *Gowan v. Tulley*, 407 NYS 2d 650, 651.

Even if the cause of action were not the same, Plaintiff-Appellee would still be collaterally estopped to assert

every point he has raised, including irreconcilable separation and our continuing relationships with our present partners, mine since 1976, PC 141 #20 (f); PC 156 #2, with Plaintiff's full knowledge, S51-88TT 33/9-21; his since July 1974, S51-88TT 31/8-10, with my knowledge PC 193; the two main factors upon which the lower court based its marital status decision.

Without the New York record lost to Plaintiff's laches, PC 158, I cannot directly prove that our relationships were heard there. But the dates of those relationships, our mutual knowledge of them, and my uncontradicted affidavit PC 156 #3, should establish that they were. Plaintiff is estopped from denying it due to the destruction of the transcript.

Separation and irreconcilable separation for any length of time are estopped because they were directly determined by the trial court: *Tait v. Western Maryland Railway Co.*, 289 US 620, 622 and 626; *Bates v. Bodie*, 245 US 520, divorce; *Harding v. Harding*, 198 US 317, 318, 319 (despite the losing party's unsuccessful argument that "only upon issues upon which judgment *depends* are parties estopped); . . .

Our relationships with other companions are estopped because they were tried, even though they are not mentioned in the New York decision: *Bingham et al. v. US*, 296 US 211, 218 (4); *US v. Stauffer Chemical Co.*, 464 US 165, 165; BLD, 5th Edition, Issue Preclusion; and because, at the very least, there was full and fair opportunity to litigate them, *Aubert v. Aubert*, in *Slansky v. Slansky*, cited; *Montana et al. v. US*, 440 US 147.



\* \* \*

## CHANGE OF PLACE – NEW YORK STATUTES & JUDGMENT GOVERN

In 1978-81, Plaintiff elected and invoked the jurisdiction of New York to exercise its authority over every single issue and fact involved in the present case. He successfully accomplished personal service on me in the State of New York, PC 202, 223. He pleaded the same New York and Vermont residencies asserted in the present case, PC 5, #1, 2; PC 40, #1, 2, not only as jurisdictional facts in New York, but also as first and second causes of action: PC 50, #1, 2; PC 51, #7; PC 53, #13, PC 203, #1, 2; PC 204, #7; PC 205, #15; PC 209, #22.

"A judgment is not immune from the requirement of Full Faith and Credit . . . because the jurisdiction of the court in one state to hear the cause may depend upon some facts different from the facts necessary to sustain the jurisdiction of the other . . ." *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 445.

Since my Vermont residency is both a fact and a cause of action in the New York record, it must be presumed *in support* of New York's decision, rather than used to open an attack upon its finality, 46 AmJ 2d 39. The only new jurisdictional fact, personal service upon me in Vermont, is irrelevant to Full Faith and Credit under *Magnolia*.

Since both parties appeared personally and by attorneys in New York, and since Plaintiff filed appeal there – which appeal did not specifically contest jurisdiction before he abandoned it – our residencies, and New York's jurisdiction over the res, are *res judicata*: *Lillienthal v. Lillienthal*, 83 NYS 2d 71, 192 Misc., 1022; *Hunt v. Hunt*, 72

NY 217; *Johnson v. Muelberger*, 340 US 581; *Sherrer v. Sherrer*, 334 US 343; 24 AmJ 2d 1112, 1120, 1125.

Plaintiff-Appellee, at PC 97, paragraph 1, cites 27A CJS 100, "A suit for divorce may be maintained by a nonresident in the state of defendant's domicile or in the state of the last matrimonial domicile," emphasis mine. Plaintiff elected the latter, which is also the state of his own residency then and to this day. The former provision, and 24 AmJ 2d 257, are irrelevant. He is not entitled to both.

"The plaintiff has a right to select in which court he will bring his action. But the plaintiff is also bound by his selection and cannot thereafter bring an action concerning the same case in a tribunal of concurrent jurisdiction . . ." 20 AmJ 2d 130

As noted in *In re Norris Trust*, 143 Vt. 325, 328, "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." To the same effect: *Coe v. Coe*, 334 US 378; *Pease v. Rathbun-Jones Engineering Co.*, 243 US 273.

Plaintiff's election of the New York jurisdiction, combined with his failure to appeal there, clinch the effect of res judicata against relitigation: *Montana et al. v. US*, 440 US 147, (d), 162-164; *Andrews v. Andrews*, 188 US 14; . . . He is now fully estopped from objecting to New York's exercise of its authority over the res, 28 AmJ 2d 73.

New York's jurisdiction is presumed, and it was, below, Plaintiff-Appellee's heavy burden to overcome that presumption: *Driver v. Driver*, 148 Vt. 560; *Loeb v. Loeb*, 118 Vt. 472, #4, citing *Williams et al. v. North Carolina*, 325 US 226, 234, and *Esenwein v. Commonwealth*, 325

US 279, 280-281; *Cook v. Cook*, 116 Vt. 374, 342 US 126, 117 Vt. 173; *Cukor v. Cukor*, 114 Vt. 456, #6; 27A CJS 260; 24 AmJ 2d 503, 1116.

Neither Plaintiff-Appellee nor the lower court has raised the slightest question of New York's jurisdiction over *Zweig*, nor does any defect appear on the record. Under the above cases, and *Underwriters N.A.C. v. North Carolina, A & H et al.*, 455 US 691, 703-705, 710, and *Putney v. Brookline*, 126 Vt. 194, #8, 9, defect in New York's jurisdiction over the parties and the res is the *only* matter open to question outside the original suit . . .

\* \* \*

The lower court has erroneously disregarded the New York decision by holding it "irrelevant" without any such proof, and should have granted the motion for dismissal in my Answer . . . Valid New York jurisdiction *means that*, under Full Faith and Credit, the res included in New York's decision cannot be relitigated, *Morris v. Jones*, 329 US 545, #2, 550-554.

28 AmJ 2d 73 notes that "A party will not be permitted to allege that a proceeding is void for one purpose as being in excess of the jurisdiction of the court, and valid for another." Plaintiff, expecting divorce to be granted in New York, made sure that New York's jurisdiction was solid in every respect. If it was solid enough for a final decree granting divorce, it is solid enough for a final dismissal of divorce upon the issues he raised there. 24 AmJ 2d 232 notes that "Jurisdiction of the subject matter of a divorce does not depend on the ultimate existence of a good cause of action in the plaintiff," and cites *Hunt v. Hunt*, 72 NY 217, to that effect. *Hunt* goes on to say:

"And so where an action for divorce is brought in a court having power to entertain such an action, and which has jurisdiction of the parties, the court has power to give judgment, although plaintiff fails to make out a cause for divorce as prescribed by the laws of the State; and this failure cannot be shown collaterally to avoid the judgment while it stands unreversed, whether the judgment is availed of in the State where granted or in a sister State . . .

If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be so valid and effectual as to bind him thereafter, and to be *res adjudicata* as to him in another like attempt by him."

Since judicial authority is the authority to *make* a decision, the weight of a court's authority cannot possibly depend on the *outcome*. Decision denying divorce has just as much authority and finality upon the issues presented as does decision granting it.

The principle of priority governs. At Plaintiff's own behest, and against the lower court's conclusion at PC 196 G, New York not only had, but *exercised* its jurisdiction and authority *first* over the *res* of this action and every issue raised herein. Plaintiff-Appellee's citations on "continuous" and "transitory" causes of action, PC 96-97, 100, 103, including *Davidson v. Helm*, 63 So. 2d 866; *Woodruff v. Woodruff*, 320 A 2d 661; *Bruce v. Bruce*, 339 SE 2d 855, and *Gee v. Gee*, 32 So. 2d 657, are all perfectly irrelevant because none involves a *prior* divorce judgment, let alone one from a sister State, entitled to Full Faith and Credit. Nor do they address the question of finality. Finality of

prior decision upon the merits puts an end to whatever may have been "continuous" or "transitory" before.

Plaintiff-Appellee also cites some US Supreme Court cases, including *Johnson v. Muelberger*, 340 US 581, 585, citing *Williams I*, 317 US 287 and *Williams II*, 325 US 226, on the validity of a divorce court's jurisdiction when only one party is resident. He cites *Pennoyer v. Neff*, 95 US 714, on the "longstanding doctrine that a state has the absolute right to prescribe the conditions upon which the marriage relation shall be created and the causes for which it may be dissolved in those cases within its proper jurisdiction." PC 97

All this is well and good. The difficulty for Plaintiff-Appellee is that these authorities sustain the jurisdiction and power of *New York*, not that of *Vermont*, because *New York ruled first*. *Pennoyer v. Neff* goes on to say:

" . . . the several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."

*Johnson v. Muelberger*, and both *Williams* cases, resoundingly affirm the application of Full Faith and Credit in divorce cases, where the first court's jurisdiction is sound.

The prior *exercise* of jurisdiction and authority, when jurisdictions are or are not concurrent, is controlling and exclusive. The first decision cannot be reopened, reconsidered, modified, or limited in any other jurisdiction. The matters involved are closed: *Riley et al. v. NY Trust Co.*, 315 US 343; *Chicago, Rock Island and Pacific Railway Co., v. Schendel, Adm'r*, 270 US 611, 616; *Bates v. Bodie*, 245 US 520, 526, divorce; *Hart Steel Co. et al. v. Railroad Supply*

*Co.*, 244 US 294; *Insurance Co. v. Harris*, 97 US 331, 336; 20 AmJ 2d 128; 24 AmJ 2d 181; 31 ALR 3d 436. *Richwagen v. Richwagen*, Vt. slip opinion 85-073, 8/14/87, holds that a Vermont trial court could not vacate its *own* divorce decision and reopen evidence; still less may a Vermont trial court reopen the final decision of a sister State, unappealed, to cumulative evidence upon questions determined – and reverse the decision.

*Johnson v. Muelberger and Williams*, cited, both refer to *Davis v. Davis*, 305 US 32, 20, and require, as *Davis* does, that Faith and Credit to a prior divorce judgment in a sister State be “not niggardly, but generous and full;” “not some, but Full Faith and Credit.” *Sherrer v. Sherrer*, 334 US 343, 354; *Halvey v. Halvey*, 330 US 610, 614, and *Harding v. Harding*, 198 US 317, 318, 336, 337, make the same point. . . .

Under Article IV of the US Constitution, New York’s decision must have the same effect in Vermont that it has in New York. The exemplified records of that decision, PC 200-237,

“ . . . shall have the same Full Faith and Credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” 1 VSA, 28 USC s. 1738, Reporter’s Note 87.

See also both *Williams* cases, cited; *Insurance Co. v. Harris*, 97 US 331, 336; 24 AmJ 2d 1103.

\* \* \*

Plaintiff’s failure to perfect his appeal, directly upon the issue of irreconcilable separation, works waiver of his



dispute with the New York decision, renders that decision conclusive and binding, and bars his relitigation of the issue now: *Underwriters N.A.C. v. North Carolina Life*, 445 US 691, 710; *Montana et al. v. US*, 440 US 147, 153-154 (in which contractor filed a notice of appeal but abandoned it); *Ackermann v. US*, 340 US 193; *Sherrer v. Sherrer*, 334 US 343; *Chicot County Dist. v. Bank*, 308 US 371, 378; *Heiser v. Woodruff, et al*, 327 US 726; *Magnolia Petroleum Co. v. Hunt*, 320 US 430; *Hubbell v. US*, 171 US 203, 210; *New Orleans v. Citizens Bank*, 167 US 371, 383; *Pease v. Rathbun-Jones Engineering Co.*, 243 US 273; *US v. Throckmorton*, 98 US 1, 65;

\* \* \*

Failure to appeal is fatal to the issue or claim, even if it can be shown that the original decision was, or is, in fact erroneous:

*Underwriters N.A.C. v. North Carolina Life*, 455 US 691, (c); *Federated Department Stores, Inc., et al. v. Moitie et al*, 452 US 394, 395; *Aldrich v. Aldrich, et al*, 378 US 540, divorce; *Reed, et al. v. Allen*, 286 US 191; *Baltimore Steamship Co. et al v. Phillips*, 274 US 316; *US v. Moser*, 266 US 236, 241; *New Orleans v. Citizens Bank*, 167 US 371, 396; *Laing v. Rigney*, 160 US 531, 542, 543, divorce, quoting *Kinnier v. Kinnier*, 45 NY 535, 542; *Scotland County v. Hill*, 112 US 182: . . .

\* \* \*

No one will imagine that this litigious Plaintiff-Appellee would be suing again here in Vermont if he had any chance of reopening, modifying or obtaining relief from the finality of the New York judgment there. He is utterly estopped in New York. That is why he is here,



hoping that Vermont will not take seriously the Constitutional requirement of Full Faith and Credit – as indeed, so far, it has not. But he is estopped here just as firmly as in New York, collaterally and by res judicata: *Lahaie v. Stor-tecky*, 457 NYS 2d 641, 642; *Parker v. Hoefer*, 142 NE 2d 194, NY, #5; *Durfee et ux v. Duke*, 375 US 106, 109; *Johnson v. Muelberger*, cited; *Coe v. Coe*, 334 US 378, 383-384; *Sherrer v. Sherrer*, 334 US 343, 351-352, 356; *Williams et al. v. North Carolina*, 325 US 226, dissent, citing *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 438, #3; *Chicago, Rock Island and Pacific Railway Co., v. Schendel, Adm'r*, 270 US 611, 616; 46 AmJ 2d 406.

The whole idea of Full Faith and Credit is that the state of original decision projects the effect of that decision beyond its own boundaries: *Riley et al v. NY Trust Co.*, 315 US 343, 348-349; *Johnson v. Muelberger*, 340 US 581, 584, 587, 589, divorce. New York holds, with regard to divorce, that

"The purpose of the full faith and credit clause was to lengthen the arm of state courts to extend over and across state lines . . . " *Warden v. Warden*, 329 NYS 2d 51, 55.

Plaintiff-Appellee remains a New York resident to this day, apparently rejecting only the authority of its divorce decree upon him, as its citizen. Prior to the amendment of 15 VSA 592, he drew me out of Vermont jurisdiction when Vermont protected me here. Now that New York protects me, and he believes that Vermont does not any longer, here he is. Irony indeed, if Vermont will permit such harassment of a Vermont citizen to succeed, in order that Plaintiff-Appellee may evade the decision, obligations, and consequences pronounced by his own

state, at his own demand, and by his own renunciation of the opportunities and burdens of appeal there.

New York will not tolerate this maneuver. In similar attempts, New York has seen fit to bring injunctions against parties taking divorce actions in other states in order to circumvent the consequences of prior New York action – even when New York's prior judgment is pleadable as bar: *Aghnides v. Aghnides*, 150 NYS 2d 371, #2, 374; *Bedient v. Bedient*, 74 NYS 2d 456, #1, citing *Palmer v. Palmer*, 50 NYS 2d 329, 52 NYS 2d 383; *Selkowitz v. Selkowitz*, 40 NYS 2d 9. . . .

The United States Supreme Court will not tolerate the "destructive power" of one state to subvert the divorce policy of another state "in matters of most intimate concern," and,

"to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged, not encouraged." *Williams et al. v. North Carolina*, 325 US 226, 237

Plaintiff maintaining his residence in New York, is bound to obey New York's divorce law "however harsh and unjust . . . (it) may be thought to be," 241.

The Frankfurter dissent in *Sherrer v. Sherrer*, 334 US 343, 362-363, expresses intense disapproval of

" . . . citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back."

Justice Frankfurter had to dissent in *Sherrer*, because *Sherer* sustained judgment granting divorce. But since the first *Zweig* decision denied divorce in Plaintiff's home state, it applies harmoniously with the majority decision to us. *Sosna v. Iowa*, 419 US 393, 406, upholds residency requirements for divorce plaintiffs partly in order to help prevent "officious intermeddling in matters in which another State has a paramount interest."

Vermont simply does not have the authority in rem to grant divorce upon the issues raised, and New York would *not* owe faith and credit to such divorce: *Esenwein v. Commonwealth*, 325 US 279; *Thompson v. Thompson*, 226 US 551, 561; *Andrews v. Andrews*, 188 US 14. *Andrews* remains applicable in *Zweig* because Plaintiff seeks to use Vermont to evade, not just the laws of his own domiciliary state, but its *prior judgment* against him when he specifically invoked the exercise of those laws upon our situation.

\* \* \*

Neither New York nor Vermont is a true "no-fault" divorce state, because both retain fault grounds. Other states, including Florida, have *abolished* all grounds for divorce other than "no-fault." Even there, and under that statutory scheme, *Ryan v. Ryan*, 277 So. 2d 266 suggests the same view of a situation like *Zweig* that New York took:

"It is never a simple matter of 'is your marriage irretrievably broken?' 'Yes, your honor, I believe it is.' And that ends it, like the Oriental ritual of the husband severing his marriage by tossing three stones in the sand one by one and in sequence, saying 'I divorce thee, I divorce thee, I

divorce thee.' . . . A contrived, false or fraudulent creation of the ground upon which dissolution is sought, for the very purpose of terminating the marriage through what amounts to a misuse, and, in effect a fraud upon the courts could no more be tolerated in this than in any other litigation. The courts will not knowingly become a party to contrivance or fraud, even in the simplified basis for divorce which has now been created . . . when such a purposeful inducement or fraud upon the other spouse is made to appear by the evidence, then there would be a failure of proof that the marriage was irretrievably broken. This is not based upon a continuation of 'fault' . . . but as a matter of fraud and deceit . . . in order to preserve the integrity of the judiciary, lest it become a party to a fraud or allow a misuse of the judicial machinery. Not even under statutory imposition can an independent judiciary which is the ultimate protection of right and justice, be subjugated and undermined. We recognize that the new 'no-fault' concept was a principal basis of the new legislation for a desired simplification of the procedure aimed at reducing the trauma of the dissolution experience. That is a legislative judgment. The foregoing remaining intolerance of fraud and deceit is a judicial prerogative . . . "

This is why New York found no irreconcilable separation, and failure of proof thereof, despite the fact that Plaintiff left us "never to return." Plaintiff's testimony, S51TT 21/2-26/13, and my own, uncontradicted, 26/14-27/20, 59/20-65/6, establish plain desertion and Plaintiff's firm rejection of both counselling and private effort together to work out our marriage.

\* \* \*

Even if 15 VSA 551 (7) could be construed to "entitle" Plaintiff-Appellee to divorce for his own desertion, Vermont still could not grant divorce in this case. Vermont is still bound to give full effect to the policy of New York in dismissing the divorce he sought there, no matter how hostile New York's policy may seem to Vermont's.

Full Faith and Credit, as applied to *statutes*, requires that the party urging it show that the foreign state's interest in the matter is superior to that of the forum state, *Alaska Packers Ass'n. v. Industrial Accident Comm. et al*, 294 US 532, 547. In New York, Plaintiff urged Full Faith and Credit, and comity, to the Vermont "no-fault" statute as he understood it, but did not make the showing of superior interest. The controlling effect of New York's law over Vermont's, if there is any difference, is therefore *res judicata*. Today, the interest of New York is clearly superior because New York has its judgment to protect, as well as its authority over its own citizen on an issue where he himself invoked that authority and did not appeal.

*Bradford Electric Co. v. Clapper*, 286 US 145, 146, 158-160, holds that the situation of Full Faith and Credit to statutes of a foreign state is quite different when set up as a *defense*, as I have set it up in this case. Where the parties by their conduct have subjected themselves to the obligations of the law of the state creating the obligation (a separation agreement, in *Zweig*)

"Refusal to recognize such a defense is a failure to give Full Faith and Credit to the statute, in violation of Article IV, section 1, of Federal Constitution." 146, #4 (2)

And even if Vermont were not persuaded by the statutes of New York as a defense, or by New York's superior interest in the matter,

"Under the Full Faith and Credit clause, judgments are . . . upon a footing different from the local law of a State, when judicial recognition of either is sought in another State . . . The constitutional command requires a state to enforce the judgment of a sister State . . . It demands recognition of it even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that State. . . . (The Full Faith and Credit clause) altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws as established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application. In each of the cases we have cited, the state to which the judgment was brought had an interest in the subject matter and a public policy contrary to that of the state in which the judgment was obtained . . . In each of these cases the words and purpose of the Full Faith and Credit clause were thought to demand that the interest of the state in which the judgment was obtained . . . should override the laws and policy of the forum to which the judgment was taken . . . When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment . . . an asserted Federal right is denied . . . " *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 437-441, 443



*Magnolia* rejected the claim of a different cause of action because of differing statutes. In *Morris v. Jones*, 329 US 545, 551, 553:

" . . . judgment obtained in a sister State is . . . entitled to Full Faith and Credit in another State, though the underlying claim would not be enforced in the State of the forum."

"The function of the Full Faith and Credit clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States . . . If full faith and credit is not given in that situation, the Clause and the statute fail where their need is greatest."

In *Parker v. Hoefer*, 142 NE 2d 194, *New York* honored Full Faith and Credit to a *Vermont* judgment, even though the entire subject matter, alienation of affections, had been abolished in *New York* and was barred "on ground of public policy:"

" . . . judgment obtained in sister state is entitled to Full Faith and Credit in another state, though underlying claim would not be enforced in the state of the forum" #5

"Notwithstanding that the *New York* statute makes such actions unenforceable as against the public policy of the state of *New York* . . . (the *Vermont* alienation of affections judgment) was final and conclusive in the rights litigated . . ."

"Because there is a full faith and credit clause, (party) may not a second time challenge the validity of (a) right which has ripened into a judgment." 196, (6)

"*New York* cannot retry the case or review as on appeal the *Vermont* judgment." 197



Vermont ought to take the same view towards New York's judgment in *Zweig*. Even if Vermont does not care about separation agreements, or about agreement on the diagnosis of irreconcilable separation, and even if Vermont *would* grant divorce to a marital deserter determined "never to return," these policy differences are slight indeed compared to that in *Parker v. Hoefer* above.

28 USC s. 1738, note 44, provides:

" . . . judgment of state court which has jurisdiction, has same credit, validity and effect in every other court in US which it has in state where it was pronounced, and state may not refuse to enforce judgment of sister state on ground that it would result in violation of public policy of forum state."

In *Estin v. Estin*, 334 US 541, 545-546, divorce:

"The Full Faith and Credit clause is not to be applied, accordion-like, to accommodate our own personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the states as independent sovereigns . . . It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."

*Sherrer v. Sherrer*, 334 US 343, (d), 355-356, quotes *Williams v. North Carolina*, 317 US 287, 302:

" 'If the application of the Full Faith and Credit clause to cases of this nature requires that local policy be subordinated, that is a part of the price of our Federal system.' That vital interests are involved in divorce litigation makes it a matter of greater rather than lesser importance . . . "

The Frankfurter concurrence in *Williams I*, 306, comments:

"There is but one respect in which this Court can . . . contributes to the uniformity of the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister state when the judgment was rendered in accordance with settled procedural standards. As the Court's opinion shows, it is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every other state."

*Williams I* explicitly refuses to entertain the possibility of limitations of Full Faith and Credit based on the relative desirability of different divorce policies.

To the same effect: *Johnson v. Muelberger*, 340 US 581; *Williams et al. v. North Carolina*, 325 US 226; *Wolfe v. Wolfe*, 407 NYS 2d 568; all divorce; *Federated Department Stores, Inc. et al. v. Moitie et al.*, 452 US 394; *Titus v. Wallick*, 306 US 282, #5, 291; *Milwaukee County v. M. E. White Co.*, 296 US 268, #7, limiting *Wisconsin v. Pelican Insurance Co.*, 127 US 265:

"(The purpose of the Full Faith and Credit clause) ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged."

*Broderick v. Rosner*, 294 US 629, 643, holding that a "transitory" cause of action does not defeat Full Faith and Credit;

PASSAGE OF TIME: IRRELEVANT TO FULL FAITH  
AND CREDIT OR CAUSE OF ACTION; AS LACHES  
FAVORS DEFENDANT

The finality of the New York judgment in *Zweig* is not compatible with the S51-88 CaF court's holding that that judgment is "irrelevant." The lower court asserts the New York decision was "final" only as to the date of its rendition and not thereafter, PC 196 F; MDT 15/10-16; S51-88TT 32/8-14; 32/22-33-1; 67/10-22. The court erroneously treats the New York dismissal as if it were a dismissal "*without prejudice*," (although even dismissals without prejudice usually become final after a certain period).

Dismissal of an action for divorce, however, is "without prejudice" and no bar to subsequent action only when that wording appears in the decree: *Harding v. Harding*, 198 US 317, 328; *Tillison v. Tillison*, 63 Vt. 411, 416; *Burton v. Burton*, 58 Vt. 414, 420, 423. *Miller v. Miller*, 123 Vt. 221, #5, holds that "Finality of judgment is the test as to whether or not the Full Faith and Credit clause of the Federal Constitution is to be respected." Since New York's decision, PC 218-224, does not denominate itself "*without prejudice*," Full Faith and Credit must apply, contrary to Plaintiff-Appellant's assertion in his docketing statement, V.

\* \* \*

*Rock Spring et al v. Gaines & Co.*, 246 US 312, 322, likewise holds bar where the prior judgment did not limit itself as to time or finality.

\* \* \*

Even if Plaintiff-Appellee could somehow allege that the New York judgment presented only a temporary bar, *White, Adm'r. v. Simonds, Conant & Co.*, 33 Vt. 178, 181-182, and *Dixon v. Sinclair*, 4 Vt. 354, 359, establish that it is Plaintiff's burden to *show* that the bar was only temporary, and also to *show* that it has since been removed – especially where Full Faith and Credit is concerned. Plaintiff has never made any such showing, and the lower court, in erroneous violation of due process, has simply shifted his burden to me by holding finality itself temporary.

Plaintiff-Appellee asserts, PC 100, paragraph 4, that 27A CJS 96 and *Bruce v. Bruce*, 339 SE 2d 855, show irreconcilable separation to be a "continuing" ground. But his citations have nothing to do with the issues in *Zweig*. 27A CJS 95 says that "continuousness" defeats statute of limitations (which is not the case in *Zweig* because of the prejudicial destruction of material evidence, PC 158). 27A CJS 96 deals with the "continuousness" of the trial court's jurisdiction over ancillary issues, not with cause of action. *Bruce v. Bruce* is not concerned with prior judgment at all, let alone judgment in another state entitled to Full Faith and Credit.

It is res judicata from S98-87 CaF, 13/15-20, 14/8-11, that the parties were directed to present law on the subject of res judicata to the New York decision to the lower court in S51-88 CaF. PC 242-243 B2. Despite Plaintiff's attorney's tantalizing hint at S98-87T 10/3-9, that he could produce law showing that "continuing" grounds defeat res judicata, collateral estoppel, and, presumably, Full Faith and Credit, he has never done so, and still notices no such authority in his docketing statements.

The same lower court, but in the person of Honorable Judge Katz, refused to permit me to amend my Answer with a Memorandum of Law, and repeatedly denied all hearing of my affirmative defenses.

Plaintiff's attorney, at S98-87T 10/15-17, and the S51-88 court at MDT 15/10-16, say they know of no law that would estop divorce eight years after the New York dismissal, but they do not say why Article IV, section 1, 2 of the US Constitution is not such a law. It is in fact the supreme law of the land.

The lower court, PC 196 F, either misapprehends or ignores the fact, S51-88TT 67/10-18, MDT 15/18-25, PC 147-148, #42, that one of the facts found in 1980 was that Plaintiff had left "*never to return.*" So New York *does* speak to the future, just as the lower Vermont court does at PC 196 E. They even make the same identical finding. The only way Plaintiff's *present* determination "*never to return*" might interrupt or modify the finality of New York's decision, would be if he had reconciled with me meanwhile for a period of resumed relations, and a second "*separation*" occurred thereafter. No such thing has happened.

\* \* \*

The lower court has played the "*accordion*" so strongly disapproved in *Estin v. Estin*, 334 US 541; the time period expands to make the "*separation*" look hopeless and the marriage ridiculous, and to deny me alimony, PC 197 J – but the "*relevant*" time period contracts to six months to remove it as far as possible from the New York decision when *res judicata* and Full Faith and Credit are in question.

"Continuousness," if it exists at all, can apply only to causes upon which no final judgment has yet been rendered. No state power, based on "continuousness" or anything else, can be used as an instrument for circumventing a federally protected right such as Full Faith and Credit: *Gomillion v. Lightfoot*, 364 US 339; *In re Senate Bill* 177, 130 Vt. 358.

*Harding v. Harding*, 198 US 317, divorce, barred action for desertion under Full Faith and Credit because there had been a prior decision in a different state granting no-fault separation, although both such causes are "continuing." The unsuccessful party asserted, as Plaintiff-Appellee does in *Zweig*, that the Illinois and California findings related to different periods of time, but the US Supreme Court didn't buy it:

" . . . the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree."

\* \* \*

The unsuccessful *Harding* party asserted in addition a change of circumstances; he claimed that since the separation decree he had asked his wife to resume relations and she had refused, so that a new ground of desertion came into existence. The US Supreme Court rejected this argument as well. *Mason v. Chase*, 120 Vt. 1, #1, and *Dixon v. Sinclair*, 4 Vt. 354, hold res judicata and Full Faith and Credit where relevant facts as to the point raised remain unchanged.

\* \* \*



Passage of time, however great, does not itself create the slightest change in circumstances all by itself. Plaintiff's determination "never to return" is old news. The fact that he has not returned by 1989, and still declares that he never will, is merely cumulative evidence to New York's original finding, and is included within it.

"Whatever is new in the evidence now before us . . . is simply cumulative. . . . the application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*." *Southern Pacific Railroad v. US*, 168 US 1, 65

To the same effect: *Werlein v. New Orleans*, 177 US 390, 399, 400.

\* \* \*

Finality of judgment upon the merits of marital status means that the issues involved have no future, should not be reopened, should not subsequently be relitigated. *Makres v. Askew*, 500 F 2d 577; *Andrews v. Andrews*, 188 US 14, 35; *Ford v. Franklin*, 129 Vt. 114, #5, and *Hunt v. Hunt*, 72 NY 217, so hold with regard to Full Faith and Credit in divorce. As *Johnson v. Muelberger*, 340 US 581, 585, divorce, puts it, citing *Davis v. Davis*, 305 US 32, 41,

"One trial of an issue is enough."

New York, jealous of its judgments, goes farther: *Bedient v. Bedient*, 74 NYS 2d 456, enjoined plaintiff husband from seeking divorce in another state subsequent to having invoked action in New York, after 5 years of

separation, lest "he might nullify any judgment wife might obtain by her counterclaim."

Other divorce cases make the same point even when Full Faith and Credit is not an issue: *Laing v. Rigney*, 160 US 531, 542 . . .

\* \* \*

Final judgment of an issue means no relitigation of it, ever, anywhere, between the same parties: *US v. Stauffer Chemical Co.*, 464 US 165, 165; *US v. Utah Construction Co.*, 348 US 394, 419-420, 395, #2(b); *Heiser v. Woodruff et al*, 327 US 726, 733; *Reed, et al., v. Allen*, 286 US 191, 196, 199, citing *Deposit Bank v. Frankfort*, 191 US 499, 510-511; *Baldwin v. Iowa Travelling Men's Ass'n.*, 283 US 522, #2, 525-526; *US v. Oregon Lumber Co., et al*, 260 US 290, 301; *Johnson Co. v. Wharton*, 152 US 252, 257; *US v. Throckmorton*, 98 US 61, 65, 69, ruling specifically against the factor of passage of time;

\* \* \*

*Insurance Co. v. Harris*, 97 US 331, 336; *Cromwell v. County of Sac*, 94 US 351, 352.

\* \* \*

Final judgment as to marital status also renders the issues decided *conclusive* and *binding*. They cannot ever again be brought into question between the parties. Under Full Faith and Credit, and 28 USC s. 1738, the exemplified New York decision is *conclusive evidence* on the *truth* of the matters decided.

\* \* \*

New York holds that Plaintiff-Appellee's determination "never to return" is not an irreconcilable separation, and that diagnosis is not warranted from that fact. Therefore, irreconcilable separation *is not the case*, and that is the end of the matter.

\* \* \*

The issue cannot be disputed in a subsequent suit, *Southern Pacific Railroad v. US*, 168 US 1, 45, 49. Petitioners can rely upon the decree in a prior suit "as having conclusively established the construction" of the issue in their favor, *Reed, et al., v. Allen*, 286 US 191, 196.

"The construction adjudged by the court would bind the parties in all future disputes . . . No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties. Whether the reasons on which it was based were sound or not . . . the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness." *New Orleans v. Citizens Bank*, 167 US 371, 396, 398

New York's decision "is conclusive as to the facts found in all subsequent proceedings between the parties . . . every (contention) requiring the negation of this fact is met and overthrown by that adjudication," *Lumber Co. v. Buchtel*, 101 US 638, 639.

The same principle governs divorce decisions: *Harding v. Harding*, 198 US 317, 319, though the separation-desertion was "continuing;" *Andrews v. Andrews*, 188 US 14, 36-37;

\* \* \*

The Vermont court lacks authority to inquire into whether reconciliation is reasonably probable in *Zweig* or not, and the lower court erred in permitting Plaintiff-Appellee to ask it to. The prior decision is permanently binding on the parties, who are estopped from contending to the contrary of New York's decision in subsequent action: *Laing v. Rigney*, 160 US 531, divorce, 543, citing *Kinnier v. Kinnier*, 45 NY 535, 542, 544; *Hunt v. Hunt*, 72 NY 217; *Heiser v. Woodruff, et al*, 327 US 726, 735; . . .

Finality of decision means repose thereafter on matters involved. It does not mean "finality" limited to the day of rendition. Full Faith and Credit and Privileges and Immunities entail a Constitutional guarantee that the mere passage of time in repose in decision cannot possibly, by itself, accrue against me as a new cause of action: *Federated Department Stores, Inc. et al, v. Moitie, et al*, 452 US 394, 394-395, quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 US 294, 299; *Riley et al. v. NY Trust Co.*, 315 US 343, 349, concerning Full Faith and Credit; *Reed, et al, v. Allen*, 286 US 191, 199; *Deposit Bank v. Frankfort*, 191 US 499, 510; *Southern Pacific Railroad v. US*, 168 US 1, 49; *Johnson Co. v. Wharton*, 152 US 252, 257, 261;

\* \* \*

A few cases, including *Commissioner v. Sunnen*, 333 US 591, 599, #5, take the view that estoppel cannot create vested rights in judgments that have become obsolete with time. But even *Sunnen*, at 600, requires "a judicial declaration intervening" to alter the finality of prior judgment. Then *Federated Department Stores, Inc., et al, v. Moitie, et al*, 452 US 394, held, after *Sunnen*, that res judicata applied against a party even when the very same

decision in which he had been involved had been overturned on appeal by his co-parties – because he, in particular, had not chosen to appeal or to join the appeal. Finally, *US v. Stauffer Chemical Co.*, 464 US 165, 165, 172-173, footnote 5, even more recently restricted the applicability of *Sunnen* to the context of taxation, and upheld the estoppel.

\* \* \*

The S51-88 lower court's view of the "finality" of the New York decision gives no hint of *any* period of time during which that decision would have authoritative effect – apparently the judgment expires at the moment it is pronounced, with less consequence than a dog license – nullifying all respect for judicial function and authority.

"The judgment, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony." *Deposit Bank v. Frankfort*, 191 US 499, 510

But states have a "compelling interest" in protecting the finality of their divorce decrees, and in insuring, through Full Faith and Credit, that collateral challenges in other states will fail, *Makres v. Askew*, 500 F 2d 577, #3, 4, 579.

Finality, conclusiveness, and an end to litigation are required for the very functioning of the courts themselves, for social order, fairness to parties, and reliance on judicial action: *Montana, et al. v. US*, 440 US 147, 153-154; *Reed, et al., v. Allen*, 286 US 191, 196, 199; *Southern Pacific Railroad v. US*, 168 US 1, 49; *Johnson Co. v. Wharton*, 152 US 252, 257, 261; *US v. Throckmorton*, 98 US 61, 65.

\* \* \*

The only legitimate significance of passage of time in *Zweig* is the laches of Plaintiff-Appellee, which includes my detrimental reliance on his failure to perfect appeal and on the rest of his delay under the stipulation embodied only in New York's decision, PC 222 paragraph 4; PC 224 paragraph 4, and the prejudicial destruction of evidence vital to my affirmative defenses, PC 158. "Continuing" ground or not, and contrary to Plaintiff-Appellee's assertion in his docketing statement VIII, laches applies because of the destruction of this evidence, which it was Plaintiff's burden to produce in his New York appeal if he disputed the finality of the decision.

\* \* \*

The New York transcript lost to Plaintiff-Appellee's delay all these years, MDT 34/1-4, would show that Plaintiff argued there comity and Full Faith and Credit to the Vermont "no-fault" statute, and all the matters enumerated in my Answer, PC 140-141. Our "long-term relationships," upon which the lower court erroneously bases its decision, S51-88TT 34/16-19, PC 195, #7 (inaccurately dated) are res judicata and collaterally estopped. If statute of limitations will not apply to this loss of evidence, laches will: *US v. Oregon Lumber Co., et al*, 260 US 290; . . .

\* \* \*

If I had ever thought that finality and Full Faith and Credit would not protect a judgment in my favor on marital status in New York, I would have counterclaimed for desertion divorce and alimony, and we could have had a decent life all this time.



Had Plaintiff perfected his New York appeal, the stipulation of severance would have been reopened as well. But now that that stipulation has gone forward, slowly and to his advantage, he seeks to overthrow that aspect of the decision which he does not consider favorable – marital status. I therefore suffer a new and unexpected liability, because the lower court has not only permitted the years of Plaintiff-Appellee's delay to accrue as a new cause of action against me, but has also asserted those same years of unconscionable desertion and non-support to *deny* alimony, PC 197 J. PC 264-265.

Under both New York and Vermont law, stipulations in marital action are contracts: . . .

The New York decision is that contract – no other embodiment of it exists. I gave up counterclaim for divorce and alimony, and have endured 15 years of economic deprivation, for the consideration that New York might, and did, decide the marital issues in my favor.

\* \* \*

*Orr v. Orr*, 440 US 268, 268, holds that stipulations in divorce action are contracts . . .

\* \* \*

All these years of Plaintiff-Appellee's delay, and of my economic disadvantage in his success with the New York stipulation, give me a vested right in the *entire* New York decision, because the stipulation I have suffered by has no other existence except therein. *Lewellyn v. Frick, et al.*, 268 US 238, 241; *Gunter v. Atlantic Coast Line*, 200 US 237; *Deposit Bank v. Frankfort*, 191 US 499, and *Bienville*

*Water Supply Co. v. Mobile*, 186 US 212, all hold res judicata partly to prevent impairment of contract under the US Constitution, Article I, sec. 10.

\* \* \*

Application of 15 VSA 592 amended to *Zweig* also effects a manifestly unjust change in the standards under which our situation is heard.

\* \* \*

In fact, 1 VSA 214 applies to any statute law, Reporters Notes 1, 2. In 1 VSA 214 "The legislature has explicitly adopted a *general* prohibition against the retroactive construction of statutes," without distinction between rights and remedies, *Stewart v. Darrow*, 141 Vt. 248, 251-253. It applies as well to the governance of proceedings in court, when a *statute* has been amended, *In re TLS*, 144 Vt. 536, 544-545.

Any alleged exemption of "access to the courts" must affirmatively appear in the language of the statute so clearly "as to admit of no other construction," *Carpenter v. Dept. of Motor Vehicles*, 143 Vt. 329, #2; *Northwood AMC Corp. v. AMC*, 139 Vt. 145, 148; 27A CJS 16. If the legislature had intended the amendment of the residency statute to be exempt, it would have said so. Since it has not, 15 VSA 592 is governed by 1 VSA 213 and 214 and the presumption of *White v. US*, 191 US 545:

"Retrospective legislation is not favored. Unless the intention that a law is to have a retrospective operation is clearly evidenced in the law and its purposes, the court will presume that it was enacted for the future and not for the past."

The effect of 15 VSA 592 amended, as permitted so far, is catastrophic on my rights in the New York decision. Because he was barred here prior to 1981, Plaintiff-Appellee adopted the strategy of drawing me into New York for personal service there of his New York complaint. I spent \$29,000 on my successful defense – which 15 VSA 592 amended now threatens to render meaningless even under Full Faith and Credit, if the trial court is upheld. New York's judgment gives me a vested right in the marital status as determined there in direct consequence of 15 VSA 592 prior to amendment, under both 1 VSA 213 and 214. As corollary, the New York judgment vests my right that the "diagnosis" of irreconcilable separation cannot be had upon Plaintiff's determination "never to return," and that a separation agreement is required.

*Carpenter v. Dept. of Motor Vehicles*, 143 Vt. 329, #3, calling it a due process issue, prohibits statutory amendment from altering the legal effect of actions taken prior to amendment, which would include the "separation" itself, my refusal to sign a separation agreement, S51-88TT 27/9-17; 28/20-30/8, my move to Vermont, my successful defense of the New York action, and the disadvantages resulting to me from the stipulation in that judgment.

*Carpenter* cites *State v. Vashaw*, 312 A 2d 692, NH 1973:

"Underlying policy of prohibition against retrospective legislation is to prevent legislature from interfering with expectation of persons as to the legal significance of their actions taken prior to enactment of law."

As it stands now, under the erroneous decision below, I am penalized anew, and suffer new disabilities, without any "triggering" action on my part.

Although 1 VSA 213 and 214 prohibit statutory amendment from affecting any prior suit or proceeding, the lower court has permitted 15 VSA 592 amended magically to absolve Plaintiff-Appellee of the burdens and obligations of perfecting his New York appeal, and of the consequences of abandoning it. It has abolished the effect of finality under the law of New York, and Full Faith and Credit as well. It has given Plaintiff-Appellee a new right which he did not have before – the affirmative right of desertion, with the blessing of the court.

*Sosna v. Iowa*, 419 US 393, and *Makres v. Askew*, 500 F 2d 577, uphold durational residency requirements for divorce plaintiffs precisely to prevent, and insure the failure of, this kind of collateral attack – a "compelling interest" of the states, according to *Makres*. Vermont simply has no authority to modify New York's decision on the irreconcilable separation issue. The amendment of 15 VSA 592 was not intended to provide a *second* jurisdictional opportunity for plaintiffs unsuccessful in their own states. Any such intent or effect is unconstitutional. By New York's decision I have the right to Full Faith and Credit, the adjudged right to my own agreement before irreconcilable separation can be found, and immunity to the present action. The finality of New York's decision cannot be "abridged" to the date of its rendition, or to 1/6/89, or to any other date whatsoever. It is absolute.

\* \* \*

*Bingham, et al., v. US* 296 US 211, 218, cites *Lewellyn v. Frick, et al.*, 268 US 238, on

" . . . the general principle 'that the laws are not to be considered as applying to cases which arose before their passage when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned."

*Lewellyn* itself repudiates the effect of "unexpected liability that if known might have induced those concerned to avoid it and use their money in other ways."

\* \* \*

It is hard to understand how the lower court could assert, as it does, PC 269, that it admitted uncertified copies "without objection." The lower court, in fact, simply neglected to rule on my Motion for Admission and Judicial Notice of the proper documents, PC 198, 199, until I finally had to write my letter, PC 269. The lower court states at S51-88TT 3/19-4/8 that trial did not have to wait until receipt of the exemplified copies because the court "expected" to hold that evidence - conclusive under USC s. 1738 - "irrelevant." So the whole pattern of Plaintiff-Appellee's defective documentation, and of the court's errors accepting it as sufficient, went cumulatively towards prejudice and the denial of Full Faith and Credit.

*Armstrong v. Manzo et ux*, 380 US 545, regarding notice, burden, and due process, notes that "The burdens thus placed were real, not purely theoretical," and that due process "must be granted at a meaningful time and in a meaningful manner."

\* \* \*

Complete, exemplified documentation was Plaintiff's burden at the outset, and was so adjudged in S98-87 CaF which is *res judicata*. I have not waived Plaintiff's burden, because of my special appearance, Motion to Dismiss, and Petitions for Permission for Interlocutory Appeal. My submission of the proper documents does not waive the objection either, because I was compelled to Answer, my Answer asserts Full Faith and Credit, and 28 USC s. 1738 requires them, *Harkness v. Hyde*, 98 US 476.

\* \* \*

Vermont lacks jurisdiction in *Zweig* under Amendment 14 of the US Constitution and Articles 4, 7 and 9 of the Vermont Constitution, because it cannot, of itself, afford the protections of 15 VSA 785-787 to me, as Vermont resident, upon the marital and economic merits of the case.

"No-fault" divorce is said to survive the tests of due process and equal protection only because it affords special equity recognizing marital merits in economic provisions, *Ryan v. Ryan*, 277 So. 2d 266.

\* \* \*

When both parties to a divorce reside in Vermont, or when the party liable for alimony payments does, Vermont law and jurisdiction affords the remedy and protection of 15 VSA 785-787, under which Vermont employers will withhold from wages and salary if alimony is not paid. This remedy-at-law was provided, for example, in *DeGrace v. DeGrace*, 147 Vt. 466, where he made \$38,000 per year, less than *Zweig* Plaintiff, and she made \$11,000



per year, about the same as I do. But when the liable party resides and is employed out-of-state, Vermont jurisdiction cannot reach the employer, VRCP 4(e).

"The statute is silent on the extent to which it is intended to reach a respondent who is out of state. Without personal jurisdiction over the employer, however, any order issued by the Vermont court could not be enforced." VRCP 80, 1985 Amendment, Reporter's Note

*Gerdel v. Gerdel*, 132 Vt. 9, points out that Vermont's jurisdiction as to marital status is in rem, but is in personam as to alimony. To satisfy equal protection under the US Constitution, Amendment 14, and Articles 4, 7 and 9 of the Vermont Constitution, Vermont must have personal jurisdiction of both parties, or at least of the party liable to pay alimony, if it is going to determine status without regard to marital merit – in order that marital merit can find its necessary and *enforceable* expression in alimony.

The lower court erroneously says, MDT 22/22-23/1, as does Plaintiff-Appellee, docketing statement VII, that this problem is met because the Vermont resident can take a Vermont alimony decree to the state of the liable party under Full Faith and Credit. This will not do, for three reasons:

1. The question is whether Vermont, all by itself, affords protection and remedy under *its* law equally to all its citizens. The question is *not* whether some Vermonters can, or ought to, seek elsewhere the remedies which Vermont provides for most of its citizens, but not for them.
2. Even under Full Faith and Credit, a Vermont alimony decree would not accomplish in another state what it

accomplished in Vermont *by statute* – a duty upon the *employer*. The foreign state might not even have a garnishment law.

3. The step of having to establish Full Faith and Credit in another state places extra burdens on the Vermonter who must seek alimony enforcement out of state. Establishing Full Faith and Credit is not easy, as we have amply seen in *Zweig*. The legal expenses involved could well make it pointless. In addition, such Vermonter might well face the burden to pursue judgment engaging the *employer* as party, which might be contrary to forum law. Neither of these burdens descends upon alimony beneficiaries whose liable ex-spouses live and work in Vermont.

Therefore, as invoked in *Zweig*, 15 VSA 592 amended violates both the United States and Vermont Constitutions.

In denying my Motion to Dismiss, the lower court completely ignored this issue, MDT 25/15-27/19, despite my discussion, 22/12-23/23. Without the slightest comment on the issue, the court attempted to dissolve the problem neatly by denying me alimony altogether, withholding or abusing its discretion thereby, in manifest injustice.

In so doing, the lower court has effectively prevented me from seeking alimony in New York, where it is enforceable – a right I had prior to the amendment of 15 VSA 592 – because New York, ever mindful of Full Faith and Credit, will not modify to award alimony where a sister State has denied it: *Beaverson v. Beaverson*, 422 NYS 2d 259; *Wertheimer v. Wertheimer*, 376 NYS 2d 638; *Silver v. Silver*, 367 NYS 2d 777; *Warden v. Warden*, 329 NYS 2d 51.

But this does not in the least render the issue moot, because the question of whether or not Vermont law *provides for* equal protection and remedy arises prior to any actual alimony determination. *Orr v. Orr*, 440 US 268, held that the party had standing to maintain a successful equal protection challenge to the state alimony statutes even though he was clearly not entitled to alimony in the particular circumstances, and had, in fact, stipulated below to *pay* alimony, not receive it.

\*     \*     \*

The discriminatory subclassification is not as easy to see as the sexism challenged in *Orr v. Orr*, or the racism challenged in *Shelley v. Kraemer*, 334 US 1. But it is a good deal easier to see than the residency discrimination successfully challenged against Vermont in *Williams et al. v. Vermont et al.*, 472 US 14, in which a grand total of \$172 in motor vehicle registration tax was at stake.

In the context of 15 VSA 785-787, and rule 80, 15 VSA 592 amended creates a classification, namely, citizens whose plaintiff spouses reside out-of-state, and a subclassification of those, namely, those who would be entitled to alimony on the basis of marital merit and economic disparity. I am a member of that class and subclass, and the law of Vermont denies me the remedy and protection of 15 VSA 785-787 guaranteed to others who resemble me in marital merit and economic disparity, but whose spouses are Vermont residents.

Relative marital merit and relative affluence of parties are the criteria relevant to the purpose of the alimony law in all its particulars. Residence of spouse is wholly unrelated to the legislative purpose.

"The Equal Protection clause . . . does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute." *Reed v. Reed*, 404 US 71, 75

To the same effect: *Louisville Gas and Electric Co., v. Coleman, Auditor*, 277 US 32, #2; *Royster Guano Co. v. Virginia*, 253 US 412; *Connolly v. Union Sewer Pipe Co.*, 184 US 540, 560, citing *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 US 150, 155, 159, 160, 165;

\* \* \*

It will not relieve the problem to say that the law treats all persons in my residency situation alike, because the criteria defining my residency situation and its disadvantages bear no just relation to the legislative purpose, and are not reflected in it. *Williams et al. v. Vermont et al.*, 472 US 14, 27, quotes *Rinaldi v. Yeager*, 384 US 305, 308: "The equal protection clause requires more of a state law than non-discriminatory application within the class it establishes." " *Shelley v. Kraemer*, 334 US 1, 22, notes that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

Marital merit and economic disparity being the relevant considerations, "The equal protection clause means that the rights of all persons must rest upon the same rule in similar circumstances," *Louisville Gas & Electric Co. v. Coleman, Auditor*, 277 US 32, #2. *Connolly v. Union Sewer Pipe Co.*, 184 US 540, 559, quotes *Missouri v. St. Louis*, 101 US 22, 31:

" . . . no person or class of persons shall be denied the same protection of the laws which is

enjoyed by other persons or other classes in the same place and in like circumstances."

\* \* \*

Such greater burden as that placed on some Vermont residents by 15 VSA 592 amended, to seek alimony enforcement out-of-state through Full Faith and Credit and whatever procedures might offer the chance of engaging employers, is unconstitutional under *Connolly v. Union Sewer Pipe Co.*, cited, 559, and would likely cost a good deal more than the \$172 in *Williams et al. v. Vermont et al.*, cited.

*Shelley v. Kraemer*, 334 US 1, (b), 14-18, holds that

"The actions of state courts and judicial officers in their official capacities are actions of the State within the meaning of the 14th amendment . . ."

"State action, as that phrase is understood for purposes of the 14th Amendment, refers to exertions of State power in all forms." *ibid.*, 20

To the same effect: *Louisville Gas & Electric Co. v. Coleman, Auditor*, 277 US 32, #2; *Schesinger v. Wisconsin*, 270 US 230.

*State v. Hoyt*, 71 Vt. 59, 64-65, notes that the Equal Protection clause applies as well to discrimination by the state against its own citizens in favor of the citizens of other states, and *Shelley v. Kraemer*, 334 US 1, 22, adds that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection to other individuals."

\* \* \*

## CONCLUSION

Defendant-Appellant asserts her rights to Full Faith and Credit, privileges and immunities, due process, and equal protection of the laws under the US Constitution, Article IV, secs. 1, 2, and Amendment 14.

\* \* \*

Under *State v. Badger*, 141 Vt. 430, 447, the Vermont Supreme Court's "first concern" is comity with the US Supreme Court. Even fundamental Vermont preferences must yield to Federal Constitutional requirements, *In re Senate Bill 177*, 130 Vt. 358, #1, 3, 6, 8, and the Vermont judiciary is required to enforce Federal Constitutional rights without Federal intervention, *In re Parizo*, 137 Vt. 365, #3.

The US and Vermont Constitutions limit the power of the legislature, and the statutory plan must be tested against them, *Peck v. Douglas*, 148 Vt. 128, #1, 2; *State v. Lambert*, 145 Vt. 315, #1. The Vermont Supreme Court does not even use our own Constitution to avoid the impact of US Supreme Court decisions, *State v. Wood*, 148 Vt. 479, 481, 482. On the contrary, it avoids statutory construction which may lead to even potentially unconstitutional applications: *Central Vermont Railway, Inc., v. Dept. of Taxes*, 144 Vt. 601, #2 604; *Holbrook Grocery Co. v. Comm. of Taxes*, 115 Vt. 275, #5.

\* \* \*



*In re Hanrahan's Will*, 109 Vt. 108, #10, says that

"Due process clause of the 14th amendment and Full Faith and Credit clause of Federal Constitution are very closely related and in most cases, if not in all, are to be considered together."

In *Zweig* 15 VSA 592 amended has been used to nullify Full Faith and Credit; to grant a second jurisdiction to overthrow the unappealed decision of a sister state upon identical facts and issue, and to permit Plaintiff-Appellee to evade the authority of his own home state, which authority he demanded upon our situation in the first place.

\* \* \*

15 VSA 592 has been applied in violation of 1 VSA 213 and 214, and without the protection and remedy of 15 VSA 785-787 available at all.

Statutes are to be construed with a view to their operation and effect, and when they operate to deprive an individual of a protected right or a Constitutional right, they do not apply: *Airway Corp. v. Day*, 266 US 71; . . . *State v. Scampini*, 77 Vt. 92, 115, citing *Connolly v. Union Sewer Pipe Co.*, 184 US 540.

\* \* \*

"The power of a State . . . to determine the limits of the jurisdiction of its courts . . . is subject to the limits imposed by the Federal Constitution." *Broderick v. Rosner*, 294 US 629, ¶42

"The State is forbidden to deny due process of law or equal protection of the laws for any purpose whatsoever." *Schlesinger v. Wisconsin*, 270 US 230

To the same effect: *Gomillion v. Lightfoot*, 365 US 339, citing *US V. Reading Co.*, 226 US 324, 357.

Defendant asserts that the question of divorce in *Zweig* is improper for the court's cognizance under Chapter 2 sec. 28 of the Vermont Constitution. The court's proper business is either to dismiss with prejudice for lack of proper documentation in Flaintiff-Appellee the second time around, or to declare lack of jurisdiction under 1 VSA 213, 214 and the 14th Amendment of the US Constitution, or to affirm Full Faith and Credit, declare its lack of authority in rem, dismiss the complaint, and be done.

*Cukor v. Cukor*, 114 Vt. 456, #9, holds that "it is the duty of the Supreme Court to render such judgment as the trial court should have rendered," – Full Faith and Credit to the divorce decree of a sister State.

\* \* \*

Notice of Additional Constitutional Questions, August 8, 1989, excerpts:

Caption Omitted In Printing

\* \* \*

2. Defendant-Appellant pro se asserts Article 1, section 10 of the United States Constitution regarding impairment of the contract embodied in the decision of New York in NY Divorce Action Index #35892-79.

\* \* \*

BRIEF OF APPELLEE, September 29, 1989, excerpts:

(Caption Omitted In Printing)

\* \* \*

(Appellee's Brief cited no authority from the Supreme Court of the United States.)

\* \* \*

II. MR. ZWEIG'S ACTION IS NOT BARRED BY THE NEW YORK DECISION IN 1980 WHICH DENIED HIM A DIVORCE

Mrs. Zweig's central argument is that this action is barred on account of the denial in 1980 of Mr. Zweig's prior divorce action. She has characterized this argument as both estoppel and res judicata. Mr. Zweig filed his New York action on the grounds of cruelty and constructive abandonment. She spends much energy trying to establish that Mr. Zweig's divorce action in New York either did or could have raised the issue of irreconcilable separation. She refers this court to the New York court's factual conclusion that Mr. Zweig had left "never to return" and to that court's apparently inconsistent and contradictory conclusion that the concept of "dead marriage" had not been established. She then asserts that these conclusions preclude Mr. Zweig from raising the issue of irreconcilable separation eight years later in a new proceeding.

Mrs. Zweig's analysis of New York law is wrong. There is no authority in New York law, either by statute or case law, for the dissolution of marriages on account of irreconcilable difference, incompatibility, or other similar

no-fault grounds; except after a one year separation pursuant to either court decree or written agreement (neither of which apply here). New York Domestic Relations Law §170.

The practice commentaries following §170 in McKinney's Consolidated Laws of New York state:

Indeed, since the legislature has not chosen to permit divorce simply because the marriage is dead and the parties are incompatible and since the jurisdiction to grant divorce is based purely upon statutory enactment, the courts may not grant a divorce simply because it is perceived that the marriage is dead. *Brady v. Brady*, 486 N.Y.S.2d 891, 476 N.E.2d 290 (N.Y. Ct. of App., 1985).

See also: *Hessen v. Hessen*, 353 N.Y.S.2d 421, 425 (N.Y. Ct. of App., 1974).

The concept of "dead marriage" arose in New York case law in connection with the "no-fault" provisions of §170 which were added to the grounds for divorce in 1966. These provisions require a separation agreement or separation decree under §200 and the courts have characterized these provisions as authorizing divorce where the marriage is "dead". Some litigants have attempted to use that discussion to create a new no-fault basis for divorce where no separation agreement or divorce decree exists. This attempt was rejected by the Court of Appeals in *Brady v. Brady*, *supra*.

Consequently, it should be clear that Mr. Zweig could not have been granted a divorce on the grounds of "dead marriage" or any other no-fault basis. The New York trial court's rejection of the applicability of "dead marriage"

was surely a correct legal conclusion that relief on that basis was unavailable.

Res judicata and/or estoppel simply do not apply as a defense to Mr. Zweig's Vermont proceeding.

Even assuming that Mrs. Zweig established, which she did not, that the issue of irreconcilable separation either could have been or actually was litigated and resolved in her favor in New York; her argument would still be unavailing. Her attempt to bootstrap a 1980 finding that Mr. Zweig left the marriage in 1974, never to return, into a permanent bar to a subsequent divorce action based upon an irreconcilable difference eight years later is ludicrous.

A finding that Mr. Zweig left "never to return" supports the factual conclusion that the parties have been irreconcilably separated since 1974. It is in no way inconsistent with the grounds for divorce asserted in the Vermont action. There was no conclusion that the Zweigs were not irreconcilably separated in 1980. On the contrary, the court's finding supports an opposite conclusion. Moreover, a claim for divorce on that ground was not even available to Mr. Zweig.

\* \* \*

Moreover, the doctrine of res judicata does not preclude reliance upon facts and circumstances existing after the entry of the prior judgment; and the litigant who loses a divorce action can refile alleging the same grounds so long as the facts and circumstances arose after the dismissal of the prior action. *Harwell v. Harwell*, 209 S.E.2d 625 (Ga. 1974); *Caratu v. Caratu*, 409 N.E.2d 929

(Affirming 415 N.Y.S.2d 835); *Booker v. Booker*, 465 N.Y.S.2d 39, 96 A.D. 522; *Telford v. Telford*, 225 So.2d 165, 167 (Fla. App., 1969).

The *Harwell* case is almost exactly on point. A wife sued for divorce alleging cruelty. The issue of whether the marriage was "irretrievably broken" was not litigated. The wife was denied a divorce and refiled on new grounds of "irretrievably broken" marriage. The husband sought to bar evidence on the new ground asserting that it could have been put in issue in the prior suit and therefore the earlier verdict established, as a matter of law, that the marriage was not irretrievably broken. The court stated:

Obviously, the denial of a divorce does not ensure that the parties will even attempt to preserve the marriage and cohabit. Therefore, new acts or a reasonable lapse of time after an adverse verdict authorizes a new suit. The subsequent suit being authorized all evidence of the marital relation is admissible for the purpose of showing it is "irretrievably broken." This is not a typical divorce suit where a party is charge with specific misconduct and the jury finds no misconduct. An "irretrievably broken" marriage is one where either or both parties are unable or refuse to cohabit and there are no prospects for reconciliation. Circumstances relating to this issue are cumulative. Therefore, once a new action is found to be authorized all relevant evidence is admissible. (at p. 627)

See: 27A CJS, Div. §263; nt. 49; *Lillus v. Lillus*, 563 P.2d 492, 495 (Kan. App., 1977); *Banks v. Banks*, 77 S.W.2d 75 (Tenn. App., 1934).



Also, the grounds of irreconcilability and desertion are continuing grounds for divorce. The cause of action arises at the time of separation but continues for as long as the parties are apart. (See discussion and cases cited in Section III, below.)

The failure to establish an irreconcilable separation in 1980 would not foreclose a subsequent action on the same legal grounds at a later date based upon continued separation after the conclusion of the past action.

\* \* \*

She also claims prejudice on account of her inability to obtain the transcript of the New York proceedings. She has failed to establish how this transcript would help her case. *Res judicata* is unavailable to her as a matter of law and the evidence presented below, if any, concerning "dead marriage" is irrelevant.

\* \* \*

#### IV. MRS. ZWEIG WAS NOT DENIED EQUAL PROTECTION OF LAW

Mrs. Zweig asserts that 15 V.S.A. §592 which permitted her husband to sue, as a New York resident, in the courts of Vermont violated her right to equal protection under the United States and Vermont Constitutions. Her argument is somewhat obscure. She asserts basically that she is prejudiced because it will be more difficult for her to enforce an alimony award against her out-of-state husband than it would if he were in-state. Her argument is untrue and illogical. Any award for maintenance would be enforceable in New York.

Even assuming that Mrs. Zweig is able to construct some theoretical prejudice, her constitutional argument must fail. Absent a suspect classification, a court will find a statute unconstitutional only when it classifies similar persons for different treatment upon wholly arbitrary and capricious grounds. Where a classification rests upon some reasonable consideration of legislative policy it will not be found unconstitutional. *Leverson v. Conway*, 144 Vt. 523, 529.

The legislature decided to allow out-of-state residents to sue in-state residents for divorce. This is entirely reasonable and logical and requires little justification.

\* \* \*

REPLY BRIEF OF THE APPELLANT, December 7, 1989,  
excerpts:

(Caption Omitted In Printing)

\* \* \*

Plaintiff-Appellee apparently does not find a single US Supreme Court case in his favor. He maintains a deafening silence on Full Faith and Credit; New York's unimpeached jurisdiction, which he invoked; its dismissal final, conclusive, and binding, to have the same effect here as in New York, with any hostility of policy resolved in favor of New York's, hence, Full Faith and Credit to New York divorce statutes; effect of 15 VSA 592 amended barred under 1 VSA 213, 214; his attempt to evade New York law and authority; . . .

\* \* \*

construction of the New York decree in my favor.

- I. RES JUDICATA BARS PLAINTIFF-APPELLEE BECAUSE HIS CAUSE IS "CONTINUING," A UNIT ARISING IN THE SAME FOUNDATION FACTS AND TRANSACTION. "SEPARATION" "NEVER TO RETURN" THOROUGHLY LITIGATED IN NEW YORK. DIFFERENT GROUNDS OR THEORIES DO NOT AVOID CLAIM PRECLUSION. ONLY INTERVENING RECONCILIATION WOULD.

Plaintiff-Appellee has got the whole point of "continuing separation" backwards. It is precisely its "continuous" nature which renders his "separation" the same claim and cause of action as in New York, and not a different one:

"Res judicata serves to preclude a renewal of issues actually litigated and resolved in a prior proceeding . . . which arise out of the same 'factual grouping' or transaction . . . a claim or cause of action is coterminous with the transaction regardless of the number of substantive theories or variant forms of relief . . ." *Braunstein v. Braunstein*, 497 NYS 2d 58, #7, p. 63, quoting *Restatement of Judgments*, 2d, (Tent. Draft No. 4, 1978) sec. 61, comment a

See also *Restatement* 2d, 1982, sec. 24, claim preclusion. The foundation factual situation in both cases is a unit related in time, space, origin, and motivation; a unit conforming to the parties' expectations and so treated by the trial court. New York has based identity of cause of action for res judicata purposes on every matter comprehended and involved in the factual situation alleged since at least 1885: *Index Fund, Inc. v. Hagopian*, 677 F Supp. 710, 715, 716, 720 (SDNY, 1987); *Perry v. Int'l Longshoremen's Ass'n*, 638 F. Supp. 1441, 1452, 1453, #12; *Romano v. Astoria FSLA*, 490 NYS 2d 244, #2; *O'Brien v. City of Syracuse*, 445

NYS 2d 687, #2, 5; *Smith v. Russell Sage College*, 445 NYS 2d 68, 71, #1; *Pigott Const. v. Contractors Ornamental Steel*, 429 NYS 2d 319, 320; *Grossman v. Axelrod*, 466 F Supp. 770, #13; *Expert Electric, Inc. v. Levine*, 554 F 2d 1227, #11; *Ruskay v. Jensen*, 342 F Supp. 264, #6, 8, 11; *Mathews v. NY Racing Ass'n*, 193 F Supp. 293, #3, 4, 5; *Eidzelberg v. Zeller-mayer*, 174 NYS 2d 300, 304, #5; *Hoffman v. Manufacturers Trust Co.*, 252 AD 495; *State v. Cascade Holding Corp.*, 249 AD 332; *Hahl v. Sugo*, 169 NY 109, 114; *Pray v. Hegeman*, 98 NY 351, 352, 354, 358. See also *Kremer v. Chemical Construction Corp.*, 456 US 461, 482, note 22; *Car Carriers Inc. v. Ford Motor Co.*, 739 F 2d 589, 594, #1, 3, 6; *Alyeska Pipeline Service Co. v. US*, 688 F 2d 765, 770-771, #2, 3, 4, 17; *Grue v. Hensley*, 210 SW 2d 7, 10; *Overseas Motors Inc. v. Import Motors Ltd., Inc.*, 375 F Supp. 449, #2.

*Res judicata* is a normal defense to a "continuing" cause of action in New York, McKinney's, p. 610, attached; *Zizzi v. Zizzi*, 306 NYS 2d 961, 962, #1, abandonment, "forever precluded." The cause of action will relate back in time: *Harding v. Harding*, 198 US 317; *Lambert v. Lambert*, 229 Ark. 536; *Babcock v. Babcock*, 146 P 2d 279; *Baptist v. Baptist*, 130 Fla. 702; *Ashton v. Ashton*, 94 SW 2d 1033; *Silverman v. Silverman*, 52 Nev. 152; *Cox v. Cox*, 163 Ga. 93; *Kelly v. Kelly*, 118 Va. 376; *Krzepicki v. Krzepicki*, 167 Cal. 449; *Greer v. Greer*, 142 Cal. 519. The past bars the future of the same issue, *Thistlewaite v. City of New York*, 497 F 2d 339, 341. Prior findings are "once and forever decisive," *National Fire Ins. Co. v. Hughes*, 189 NY 84, 88-89, or else legal action becomes an "idle ceremony," *Wallace Clark & Co. v. Acheson Industries, Inc.*, 532 F 2d 846, #3. No one doubts that if New York had granted divorce, its decision would be final. Plaintiff-Appellee's mistaken

view of "continuousness" comes up short against *Kremer v. Chemical Construction Corp.*, 456 US 461, 470:

" . . . the state courts would be placed on a one-way street; the finality of their decisions would depend on which side prevailed in a given case."

Plaintiff-Appellee could reopen our case if the New York decision designated itself without subject matter jurisdiction, "without prejudice" or "not on the merits" – but it doesn't. See *Car Carriers Inc. et al. v. Ford Motor Co.*, 583 F Supp. 221, 224; *Coleman v. Coleman*, 522 A 2d 1115, 1117, 1120; *Jorgensen v. Jorgensen*, 428 NYS 2d 304; *DeLaurentis v. Seafarers Port O'Call Corp.*, 162 NYS 2d 487, #1; *Senor v. Senor*, 272 App. Div. 306, 314; *Everett v. Everett*, 215 US 203, 213, 215-216; *The People v. Case*, 241 Ill. 279, 287 (divorce); *Brown v. Brown*, 37 NH 536, 537.

Plaintiff-Appellee's citations might allow him to sue again if he had come back to me for awhile, or had at least made a good-faith offer – though the latter would not defeat Full Faith and Credit under *Harding*. In *Booker*, offers to resume sexual relations were made by plaintiff and rejected after the prior dismissal; in *Harwell* he moved back in and she moved out; and in *Telford*:

"One spouse may ultimately obtain divorce if the other spouse refuses to resume his or her marital obligations subsequent to prior denial of a divorce," #6, 7.

27A CJS 263, note 49, goes on to say:

"So, a judgment denying a divorce or separation is not a bar to subsequent action by the same plaintiff based on the other spouse's subsequent rejection of an offer of reconciliation."



See also *Unanue v. Unanue*, 141 AD 2d 31, 41, (NY), #2; *O'Leary v. O'Leary*, 256 App. Div. 130, NY; *Lovingood v. Lovingood*, 472 SW 2d 58.

Plaintiff-Appellee's other cases rest on the occurrence of new facts since prior trial. In *Carratu* plaintiff had physically abused her since; in *Banks* "facts have changed or new facts have occurred"; *Lillis* produced psychiatric testimony on new incidents of "incompatibility." But there is nothing new in *Zweig*. No "separation" has occurred since the one tried in 1980. Under *Braunstein*, supra, the *Zweig* transaction is "coterminous" with Plaintiff-Appellee's New York declaration, my New York counterclaim, and the New York court's finding that he left in 1974 "never to return". Only his return would close that transaction.

New York deems nominal divorce claims and counterclaims amended to conform to the facts alleged: CPLR 3017(a), 3025, attached; *Zagarow v. Zagarow*, 430 NYS 2d 247, 249-250; *Diemer v. Diemer*, 203 NYS 2d 829, #11, 12, 830, 834; *Samios v. Samios*, 139 NYS 2d 454, 455, #3. Plaintiff-Appellee's New York:

" . . . formal prayers, which are never determinative, were equivocal and adaptable to one theory or another as suited plaintiff's legal exigencies." *Eidelberg v. Zellermayer*, 174 NYS 2d 300, 304

But the "same cause of action," for res judicata purposes, is not altered by different grounds or theories. Citing *Loeper v. Loeper*, 81 Wash, 454:

"While there may be several grounds . . . there can be but one cause of action, which cannot be split . . . while the statute contains a number of



grounds for divorce, a wife conceiving herself entitled to divorce on two or more grounds would not be permitted to pursue them separately, but would be deemed to have waived all grounds not urged in the first action." 138 ALR 374-375

"Transaction" and "set of facts" preclude "new garb": *Washington v. Groen Division Dover Corp.*, 634 F Supp. 819, 821-823; *Multi-State Communications, Inc. v. US*, 648 F Supp. 1202 (SDNY 1986), 1206; *Car Carriers Inc. v. Ford Motor Co.*, 789 F 2d 589, #3, 594, 596; *Palatine National Bank v. Guardian Tampa Ltd. Ptp.*, 475 NE 2d 1045, 1047; *Isaac v. Schwartz*, 706 F 2d 15, 17, #5, 6; *J. Aron & Co., Inc. v. Service Transp. Co.*, 515 F Supp. 428, 445, 447, citing *Restatement of Judgments*, 2d, (Tentative Draft No. 5, 1978), chapter 3 and sec. 61.1 comment d, asserting "set of facts" definition since 1938; *Carbonaro v. Johns-Manville Corp.*, 526 F Supp. 260, #4, 5; *Garr v. Lerner*, 528 F Supp. 630, 632-633; *Forst v. Wohl*, 412 NYS 2d 663; *Ezagui v. Dow Chemical Corp.*, 598 F 2d 727, #2, bar on alternative grounds; *In re Orbitec Corp.*, 392 F Supp. 633, #5; *Scoggin v. Schrunk*, 522 F 2d 436, 437, note 2; *Wolcott v. Hutchins*, 245 F Supp. 578, #4; *Goldstein v. Doft*, 236 F Supp. 730, #9; *Teitelbaum et al. v. Mutual Life Ins. Co. of NY*, 37 NYS 2d 857, 858; *Restatement of the Law, Conflict of Laws*, 2d sec. 95 comment c 4; *Restatement of Judgments*, 2d, 1982, sec. 24 comment d, sec 25.

Different or alternative grounds for divorce – some of them "continuing" – are barred in *Harding*, US, supra; *Everett*, US, supra, 210-211, 213; *Zizzi*, supra, 962; *Ashton*, supra, 1035, 1036 (6); *Silverman*, supra, 153, 155, #4, 6, 7; *Cox*, supra, 93; *Merriam v. Merriam*, 207 Ill. App. 474.

If New York requires a separation agreement for "no-fault" divorce, and if Vermont does not, such variation in evidence required will not destroy the identity of claim for preclusion purposes: *Nevada v. US*, 463 US 110, 130-131, note 11; *J. Aron & Co., Inc. v. Service Transp. Co.*, 515 F Supp. 428, 443, 445, note 21; *SS Kresge Co. v. Winget Kickernick Co.*, 96 F 2d 978, 998; *Restatement of Judgments*, 2d, 1982, sec. 24, comment a. In any case,

"The 'same evidence' test may be useful as a positive test for determining the identity of claims, but it is not useful as a negative test."  
*Ruskay v. Jensen*, 342 F Supp. 264, 270-271

## II. PLAINTIFF-APPELLEE IS JUDICIALLY ESTOPPED FROM FOUR INCONSISTENT POSITIONS:

1. THAT NEW YORK'S DECISION IS NOT FINAL, CONCLUSIVE, AND BINDING.
2. THAT "IRRECONCILABLE SEPARATION" WAS NOT PROPERLY RAISED AND DETERMINED IN NEW YORK.
3. THAT THE SUBSTANTIVE LAW OF VERMONT SHOULD GOVERN HIS "SEPARATION."
4. THAT MY AFFIRMATIVE DEFENSES WERE PRESENTED AND HEARD IN THE MOTION TO DISMISS BELOW.

1. He has endorsed the New York decision in its entirety, having made no post-trial motions to amend it to indicate "lack of subject-matter jurisdiction," "without prejudice," or "not on the merits," p. 2-3 ante, *Angel v. Bullington*, 330 US 183, 189. He abandoned appeal, *Wilson's Executor v. Deen*, 121 US 525, 532, 534. We have both relied on the decision severing economic issues by

stipulation, to his advantage and my detriment through 8 more years of litigation. Resisting alimony, he continues to affirm the economic outcome to this day: S98-87T 4/1-11; MDT 28/11-29/20; 30/29-31/7; S51-88TT 12/17-13/8.

"(party) cannot recognize one portion of the judgment and ignore the remainder . . ." *Farm-land Dairies v. Barber*, 489 NYS 2d 716, 717

See also *Anonymous v. Anonymous*, 524 NYS 2d 823, 824, 825, #2; *Cerbone v. Cerbone*, 428 NYS 2d 777, #9, 12; *Kinyon v. Kinyon*, 6 NYM 584, 587-588; *Watkins v. Madison County Trust & Deposit Co.*, 40 F 2d 91, #10, 11; *Moore v. Hanover National Bank*, 80 NYAD 67, 72; *Mills v. Hoffman*, 92 NY 181; *Order of Travelers v. Wolfe*, 331 US 586, #10; *Marcus v. Marcus*, 90 NYS 2d 830, #11; *Matter of Mount*, 27 NYM 412; *Goshy v. Morey*, 149 Vt. 93, 97; *Restatement of the Law, Conflict of Law*, 2d sec 74 b, 225. The stipulation, embodied only in New York's decision, renders that decision a contract. Plaintiff-Appellee takes the finality of the economic outcome in consideration of the finality of the status outcome favoring me: *Josephs v. Josephs*, 358 NYS 2d 326, 330, #2; *Martin v. Martin*, 312 NYS 2d 520, 523, #1; *Coleman v. Coleman*, 522 A 2d 1115, 1121; *White et al v. White et al.*, 68 Vt. 161, 165; Appellant's brief, p. 61-63.

2. Plaintiff-Appellee initiated litigation of "dead marriage" in New York for its value as a discretionary factor in the cruelty ground (Appellant's brief p. 24-25) and against my counterclaim of willfull desertion, PC 214, #11. He was entirely successful in establishing the materiality of the issue, if not the fact itself. He made no post-trial motions to amend the findings and conclusions to strike the point he now holds improper, see CPLR

4404, 5015, 5019, attached. Under Full Faith and Credit he cannot get relief from judgment here, *Overmeyer v. Eliot Realty*, 371 NYS 2d 246, #24. Belying his present position, he selected irreconcilable separation as the basis of his appeal, claiming that the trial court had not considered it enough, PC 231, #8, and then abandoned appeal which might – who knows? – have ruled further on the question. But as it stands, all New York parties, attorneys, and the trial court accepted his issue as material and necessary, and litigated it to final decision.

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him . . . even if the assertion was made by mistake." *Davis v. Wak-  
elee*, 156 US 680, 689, 690

See also *US v. Edmondston*, 181 US 500, 504, 509, 515; *Will of Schwartz v. Greenfield*, 478 NYS 2d 553, 554, #2; *Stevens v. Wright*, 107 Vt. 337, #5; *Tyler v. Turner Center System*, 102 Vt. 202, 204; *Chicot County Dist. v. Bank*, 308 US 371, 375, 378; *Synanon Church v. US*, 820 F 2d 421, 426-427, #4 citing *Restatement of Judgments*, 2d, sec. 27, comment j; *Matter of Granata*, 392 NYS 2d 703, #1; *Lalime v. Wilfred Desbiens*, 115 Vt. 165, 168; *Vilas v. Smith et al.*, 108 Vt. 18, #2

Plaintiff-Appellee had the advice of at least two legal firms prior to the New York trial, and a third shortly thereafter, and is fully chargeable with such knowledge of New York law as he could have acquired by diligence: *Schuman v. Schuman*, 137 NYS 2d 485, 489-490, #11;

*Judkins v. Judkins*, 92 A 2d 120, 130, #5; *Bronxville Palmer, Ltd. v. State*, 277 NYS 2d 402, 407; *Wolcott v. Hutchins*, 254 F Supp. 578, 580-581; *Norris v. Grosvenor Marketing Ltd.*, 803 F 2d 1281, 1288; *Edmunds Brothers v. Smith et al.*, 95 Vt. 396, 405. He may have made a poor tactical choice, but he cannot be relieved of it here and now: *In re Morgan Guaranty Trust Co.*, 320 NYS 2d 905, 911; *Wells v. Rockefeller*, 728 F 2d 209, 214; . . .

\* \* \*

#### Plaintiff-Appellee

" . . . now argues that presentation of these (issues) . . . 'constituted surplusage and was outside the scope of the issues before the . . . tribunal.' However, having himself framed the issues, he cannot now avoid them. The whole-some principle of *res judicata* is not to be overcome so easily." *Goldstein v. Doft*, 236 F Supp. 730, 734, #10

See also *Sengstack v. Sengstack*, 166 NYS 2d 576; *Long Island Railroad Co. v. City of New York*, 64 NYS 2d 391, #7; . . .

Under New York law, objection to the jurisdiction and authority of the court

" . . . does not apply when the court had jurisdiction of the subject matter but a contention is made after judgment that the court did not have power to act . . . as to a particular question in the case." *Matter of Anthony J*, 143 App. Div. 688

See also *Matter of Rougeron*, 17 NY 2d 264, 271; *Hunt v. Hunt*, 72 NY 217.



Plaintiff-Appellee is really saying that he meant to be bound by New York's decision on irreconcilable separation only if the finding went in his favor, *In re HS Dorf & Co.*, 274 F Supp. 739, 747-749, #1, 5, 10. He is playing "fast and loose," *Environmental Concern v. Larchwood Const.*, 476 NYS 2d 175, 177.

3. Plaintiff-Appellee, knowledgeably and on his own initiative, submitted his continuing "separation" – and its allegedly "irreconcilable" character – to the provisions of New York's substantive law, *Bell et al. v. Hood et al.*, 327 US 678, 681. His conduct estops him from resorting to Vermont law now; New York authority continues: *Restatement of the Laws, Conflict of Laws*, sec. 6, #4, 6; sec. 26, comment g; sec. 74 (b). See V. below.

4. Plaintiff-Appellee's earlier position was that affirmative defenses like *res judicata* were improper in a Motion to Dismiss, PC 100, pp. 2-3; PC 104, pp. 2. I relied on his assertion, and on VRCP 8 (c), 12 (b), and 83, and specifically refrained in order not to waive them at their proper time, MDT 15/22-25; 20/13-14. I alerted the court to *res judicata* as an issue to come later, thus requiring proper certification of documents in Plaintiff for Full Faith and Credit and 28 USC s. 1738, and showed uncertified documents only as an offer of proof to that end, MDT 12/18-25; 33/4-8. Plaintiff-Appellee cannot now put forward the lower court's error in outright contradiction of the position he himself urged. After he helped induce my expectation of when and how affirmative defenses would be handled, they were never permitted to be briefed or heard at all, to my prejudice.



III. NEW YORK PROPERLY ENTERTAINED "IRRECONCILABLE SEPARATION" AS MATERIAL AND NEGATIVED THE FACT, WHICH IS RES JUDICATA. FULL FAITH AND CREDIT PERMITS NO INQUIRY. THE ISSUE IS PRESUMED MATERIAL. ERROR OF LAW ON ITS MATERIALITY, OR PLAINTIFF'S FRAUD IN LITIGATING THE ISSUE, DO NOT IMPAIR THE DECISION.

Plaintiff-Appellee disingenuously asserts "the New York trial court's rejection of the applicability of 'dead marriage.'" The New York court did no such thing. It entertained his and my contentions on "dead marriage" – at his initiative – as applicable doctrine. It then weighed whether or not "dead marriage" can be the *fact* upon Plaintiff's determination "never to return," and concluded that it is not, PC 222, p. 2; PC 219, p. 5. For the line of authority granting cruelty divorce for "dead marriage," see Appellant's brief pp. 24-25. Similar cases include *Siczewicz v. Siczewicz*, 460 NYS 2d 131; *Perri v. Perri*, 454 NYS 2d 277, 278; *Salk v. Salk*, 393 NYS 2d 841; *Armstrong v. Armstrong*, 365 NYS 2d 308, #2; *John W. S. v. Jeanne F. S.*, 367 NYS 2d 814, 817, 818; *Cinquemani v. Cinquemani*, 346 NYS 2d 875, 877. Quite recently *Niles v. Niles*, 510 NYS 2d 781, says that "dead marriage" will not "establish" cruelty, but, at #4, grants divorce on evidence far below the cruelty standard, as did the trial court. *Hessen v. Hessen*, 353 NYS 2d 421, holds at #1 and at 426, (3, 4) that:

"Conduct endangering mental well-being by making cohabitation 'improper' though not necessarily 'unsafe' is a ground for divorce, 170 DRL (1). . . . On the other hand the application of the cruel and inhuman treatment ground to

*every* 'dead marriage' would also seem unwarranted. The correct view would seem to lie in between, with the courts below permitted to exercise broad discretion in balancing the several factors . . . " (my emphasis)

The *Zweig* court took this approach, exactly as Plaintiff urged, since *Hessen* will authorize "application" of the cruelty ground to *some* (not "every") "dead marriage." *Zweig* denied divorce finding *Zweig* not a "dead marriage" at all in the first place. *Zweig* is a willfull desertion. *Brady v. Brady*, 476 NE 2d 260, affirming 475 NYS 2d 470, several years later than *Zweig*, was no precedent for us, but it bears out both *Hessen* and *Zweig*, denying divorce because, as in *Zweig*, "dead marriage" was not really the fact. *Brady*, in 475 NYS 2d 470, 472, showed that plaintiff husband had left the marriage; defendant wife wanted him to return, and had not refused sexual relations. He made "insufficient showing," and,

" . . . if anything, the record supports a finding that defendant was entitled to a divorce on the ground of abandonment. She, however, does not seek such relief, but instead is desirous of resuming the marital relationship."

*Brady* denies divorce by reversal on appeal, as do *Tsakis v. Tsakis*, 488 NYS 2d 51; *McCann v. McCann*, 488 NYS 2d 927; and *Kleindinst v. Kleindinst*, 498 NYS 2d 610. Such cases prove that currently New York trial courts *continue to grant* cruelty divorces *when they find* "dead marriage" alone as a fact. We cannot even guess how many such trial court "dead marriage" cruelty divorces have been finalized by failure to appeal. However, if the *Zweig* trial court had found "dead marriage" to be the fact, and had granted divorce solely thereon, and if I had

not appealed, would Vermont hear me, in an independent action eight years later, to claim that New York had lacked authority on the question under *Brady*? Not likely. *Res judicata* applies to questions of law as well as to fact, even if erroneous, *Glasser v. AFM of US & Canada*, 354 F Supp. 1, #3, 4.

Plaintiff-Appellee now claims that he "could not have been granted" divorce on "dead marriage." But this, even if true, goes only to the sufficiency of his factual cause of action, and not at all to New York's jurisdiction.

"It is the rule that subject matter jurisdiction otherwise nonexistent may not come into being through waiver . . . However, there is a well-settled exception proviso that this does not apply when the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case." *Matter of Rouge-ron*, 17 NY 2d 264

To the same effect see *Angel v. Bullington*, 330 US 183, 190; *Bell et al. v. Hood et al.*, 327 US 678, 682; *Moore v. NY Cotton Exchange*, 270 US 593, 608; *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F 2d 710, 714-715; *Cerbone v. Cerbone*, 428 NYS 2d 777, 779, #9; *Carr v. Carr*, 400 NYS 2d 105, #6; *Town of Amherst v. Niag Front. Auth.*, 19 AD 107, 113-114, 241 NYS 2d 247; *International Paper Co. et al. v. Bellows Falls Canal Co.*, 91 Vt. 350, 366; *Car Carriers Inc. v. Ford Motor Co.*, 789 F 2d 589, 592, 594, 596; *Coleman v. Coleman*, 522 A 2d 1115, 1117; *Covert v. Hall*, 467 So. 2d 372, 374; *DuPont v. DuPont*, 90 A 2d 468, #6. Indeed, were it otherwise, all decisions against plaintiffs would, ipso

facto, have lacked jurisdiction. Forum-shopping would be the rule, and plaintiffs could never lose!

Plaintiff-Appellee argues that New York's finding that he left "never to return" *supports* irreconcilable separation – but this is the exact opposite of what the decision says. *In re HS Dorf & Co.*, 274 F Supp. 739, 748, notes the "quicksand" of such a claim, and the "sophistry" of the party alleging he is upholding the prior decision rather than trying to vacate it.

Plaintiff-Appellee calls New York's decision "inconsistent and contradictory." But when jurisdictional requirements are met

" . . . the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." *Milliken v. Meyer*, 311 US 457, 462, #4, reversing the Supreme Court of Colorado

To the same effect: *Everett v. Everett*, 215 US 203, 213; *Roche v. McDonald*, 275 US 449, 453; *Mansfield State Bank v. Cohn*, 407 NYS 2d 373, #5; *In re Morgan Guaranty Trust Co.*, 320 NYS 2d 905, 911; *Bell v. Merrifield*, 109 NY 202, 203; *Wright Machine Corp. v. Seaman-Andwell Corp.*, 307 NE 2d 826, #7; *SS Kresge Co. v. Winget Kickernick Co.*, 96 F 2d 978, 998; *Forrest v. Fey*, 218 Ill. 165, 168-169, #1 divorce; Appellant's brief p. 54 ¶ 4.

Plaintiff-Appellee himself points out that, in his *Harwell* case, the issue in point, irretrievable marital breakdown, "was not litigated." In *Zweig*, however, it was, The New York trial lasted at least 9 days, S98-87T 10/18-20 – actually 11. The decision records that the

parties did not agree on the "dead marriage" diagnosis – PC 222 ¶ 2 – which proves that that fact was contested. Plaintiff presented 7 witnesses to my one. Long trial, actual litigation, and express determination by the court make its decision final, conclusive, and binding, *Lambert v. Lambert*, 229 Ark. 535; *Synanon Church v. US*, 820 F 2d 421, 426, 427, #4, quoting *Restatement of Judgments*, 2d, sec. 27, comment j; *Oklahoma v. Texas*, 256 US 70, 92-93.

"Under New York law, when it is clear that a litigant was afforded his day in court, preclusive effect may be given to issues actually and fully litigated, although not technically necessary to the prior court's judgment." *Murphy v. Gallagher*, 761 F 2d 878, 881, #3, 4

New York presumes the pertinence of issues determined prior, even if not included in pleadings, and authorizes examination of testimony towards estoppel of prior adjudication – the transcript now lost to Plaintiff-Appellee's laches: *Bronxville Palmer, Ltd. v. State*, 277 NYS 2d 403, #6, 11. Vermont likewise assumes materiality in the absence of a transcript: *Essex Chair Co. v. Fine Furniture Co.*, 116 Vt. 145, 146. See also Appellant's brief, p. 27.

Surplusage will not be found where the issue was actually and fully litigated, squarely addressed and specifically decided, *Aldrich v. State*, 494 NYS 2d 662; *GTF Marketing v. Colonial Aluminum Sales*, 488 NYS 2d 219, 222, #2, 3 – and especially not when claimed by the party who himself framed the issues, *Goldstein v. Doft*, 236 F Supp. 730, 734; *Abate v. Mundt*, 300 NYS 2d 447, 449, #1, 2.

Plaintiff-Appellee argues at best that New York erred in law to decide "dead marriage" as a material issue, and erred in fact to hold no "dead marriage" upon its finding



that he had left "never to return." But error of fact, law, or both will not avoid New York's jurisdiction, Full Faith and Credit, res judicata and finality, when appeal is abandoned: Appellant's brief, p. 35-38; *Tait v. Western Maryland Railway Co.*, 289 US 620; 50 CJS p. 1091; *Restatement of the Law, Conflict of Laws*, 2d, sec 97 at 294, sec. 105 at 317, sec. 106 at 319; *Roche v. McDonald*, 275 US 449; *American Express Co. v. Mullins*, 212 US 311, 312; *Wilson's Executor v. Deen*, 121 US 525, 534; *Matter of Proceeding for Support, Etc.*, 405 NYS 2d 225, #4; *Ellenstuck v. Klein*, 570 F 2d 414, #4; *Goldspinner v. Goldspinner*, 382 NYS 2d 824, #2; *Schlossberg v. Schlossberg*, 309 NYS 2d 631, #12, 13; *Overmeyer v. Elliott Realty*, 371 NYS 2d 246, #12, 24; *Bronxville Palmer, Ltd. v. State*, 277 NYS 2d 402, 410; *Statter v. Statter*, 163 NYS 2d 13, 19; *Schuykill Fuel Corp. v. Nieberg Realty Corp.*, 350 NY 304, #2; *Matter of Mount*, 27 NYM 413; *Holton Estate v. Ellis*, 114 Vt. 471, #15; *Covert v. Hall*, 467 So. 2d 372, 374.

" . . . res judicata 'makes white black, the crooked straight, the straight crooked' as between the litigants." *In re HS Dorf & Co.*, 274 F Supp. 739, 750, #10

Plaintiff-Appellee notes that "some litigants" in New York attempt what sounds like a fraud - using "dead marriage" and the cruelty ground "to create a new no-fault basis for divorce where no separation agreement exists." Such attempts meet with pretty fair success, for frauds, ante, p. 8-9. At any rate, he and his New York attorneys are fully chargeable with such knowledge of the law as they could have acquired through diligence, ante p. 6-7. He certainly cannot plead his own fraud, if any, to impeach the decision now, *Gioia v. Gioia*, 245 App.



Div. 373; *Senor v. Senor*, 272 App. Div. 306. If it was fraud at all, it is *intrinsic* to the issues he litigated, *Senor* at 313; *Chenu v. Board of Trustees*, 212 NYS 2d 820, #2 (divorce). Relief for intrinsic fraud is "available only in the original action," *Chenu* at 820, as is relief for party's mistake, *US v. Edmondston*, 181 US 500, 504, 509, 515.

But the New York decision in *Zweig* does not, after all, "make the straight crooked." It holds the crooked crooked. The New York statutes and decision expose the real fraud, which is fraud in cause of action, Plaintiff-Appellee's representation of his willfull desertion as "irreconcilable separation." That is why New York requires a separation agreement, *Zientara v. Zientara*, 299 NYS 2d 253, 261; *Middleton v. Middleton*, 316 NYS 2d 583, 584. *Good v. Good*, 342 A 2d 578, #5, refused to apply "no-fault" where the facts show fault. See also Appellant's brief, p. 40-41, on fraud in "no-fault," *Ryan v. Ryan*, 277 So. 2d 266.

IV. . . . RES JUDICATA WHERE MY RIGHT TO A SEPARATION AGREEMENT, ESTABLISHED BY NEW YORK LAW AND DECISION, IS IMPAIRED.

\* \* \*

If New York law cannot grant Plaintiff-Appellee "his divorce" without a separation agreement, then that law, and the *Zweig* decision thereunder vest my right to no divorce without my agreement. Vermont, so far, has destroyed that right.

"Under New York's concept of res judicata, two lawsuits are based on the same cause of action if a different judgment in a later action would destroy or impair rights established by earlier action." *Winters v. Lavine*, 574 F 2d 46, #4

See also *Statter v. Statter*, 163 NYS 2d 13, 17; *Lacks v. Lacks*, 390 NYS 2d 875, #4, 6; *Matherson v. Matherson*, 295 NYS 2d 122, #3; *Chicot County Dist. v. Bank*, 308 US 371, 374; *Oltarsh v. Oltarsh*, 43 NYS 2d 901; *Expert Electric, Inc. v. Levine*, 554 F 2d 1227, #10; *Grossman v. Axelrod*, 466 F Supp. 770, #14 (res judicata on issue not raised); *Andrews et al. v. Merrywood Country Club, Inc. et al*, 281 NYS 2d 922; *Schuykill Fuel Corp. v. Nieber Realty Corp.*, 250 NY 304, #1. The same rule applies upon my New York counterclaim of willfull desertion, PC 214 #11; 64 *West Park Avenue Corp. v. Parlong Realty*, 354 NYS 2d 342, #1, 2, 4, 6; *Restatement of the Law, Conflict of Laws*, 2d, sec. 34, p. 139.

\* \* \*

V. CONFLICT OF LAW PRINCIPLES REQUIRE VERMONT TO APPLY NEW YORK'S SEPARATION AGREEMENT RULE. SITUS OF RES, PLAINTIFF BROUGHT SUIT THERE, PLAINTIFF'S CONTINUING DOMICILE. 15 VSA 592 SUBSTANTIVE; BAR UNDER 1 VSA 213, 214.

The marital res follows the *domicile* of plaintiff, *Carr v. Carr*, 400 NYS 2d 105, 109. *Alton v. Alton*, 207 F 2d 667, held it unconstitutional under due process to grant divorce to a plaintiff who is not a domiciliary of the jurisdiction and does not claim to be. The dissent, 684-685, suggests that where one of the parties is a domiciliary, the substantive law of the state where they were living at the time of the conduct bringing about their estrangement should control.

Uniformity of decision and harmony of law between jurisdictions are especially desirable upon a "continuous" relationship or transaction, *Sullivan v. McFetridge*, 55 NYS 2d 511, 531, 532, #26, 27, and forum-shopping should be

discouraged, *Restatement of the Law, Conflict of Laws*, 2d, sec. 6, #4, 6; sec. 26, p. 119; sec. 34, p. 139; *Maloney v. McMillan Book Co.*, 277 NYS 2d 499, #5. Plaintiff-Appellee cannot "pick and choose," *LaBombard v. Peck Lumber Co.*, 141 Vt. 619, 623.

Full Faith and Credit will be enforced even against strong public policy in the forum: *Restatement of the Law, Conflict of Laws*, 2d, sec. 3, #3; sec. 9, p. 31, 33; sec. 26, p. 119, comment g; sec. 117, p. 339; *Union National Bank v. Lamb*, 337 US 38, 41-42, citing *Roche v. McDonald*, 275 US 449, 452-454, #2, and *Morris v. Jones*, 329 US 545; *Farmland Dairies v. Barber*, 489 NYS 2d 716, #3, 7; *DiRusso v. DiRusso*, 287 NYS 2d 171, 181; *Rosensteil v. Rosensteil*, 262 NYS 2d 86, 90 (3), 100-101; *Marcus v. Marcus*, 90 NYS 2d 830, 837; *Judkins v. Judkins*, 92 A 2d 120, #3; Appellant's brief, p. 44-47.

"To say . . . that a matrimonial res, which in its very nature must necessarily consist of the bilateral unity of the parties, may be treated as if it were two wholly independent res, is obviously an unsupportable fiction. The very statement that the res of one party to a marriage is different from that of another necessarily negatives the very foundation upon which the *Williams* case rests, since if the state of the husband's domicile may operate on the husband's matrimonial res because that is within its jurisdiction, then, it must necessarily follow that the remaining portion of the res may likewise be dealt with by the State of the remaining spouse's domicile. Such a position would tend to support conflicting determinations of the sister States, acting independently, on the res of the party domiciled within each boundary." *Russo v. Russo*, 62 NYS 2d 514, 518

So *Russo* gives Full Faith and Credit to a Nevada decree, in "violence . . . to our public policy," 521, and, at 522-523, cites *Esenwein v. Pennsylvania*, 325 US 279, on the point that irreconcilable marital policies of two states require one to give way. No "end run" is permitted, *Garr v. Lerner*, 528 F Supp. 639, 632-633, #2.

" . . . any statute, rule, or procedure, or even any constitutional provision in any State, to the contrary notwithstanding . . . the provision of the Federal Constitution with respect to the force and effect to be given to the judgments of other States, and the act of Congress passed in pursuance thereof, is the supreme law of the land, and any statute or rule of practice in this State that would tend to detract or take from such a judgment the force and effect that it is entitled to under the Federal Constitution and in the State where rendered must be deemed inoperative." *Everett v. Everett*, 215 US 203, 208-209

Under New York's CPLR 4511, attached, Plaintiff-Appellee could have argued Full Faith and Credit to Vermont's "no-fault" statute as he understood it, in New York, and urged its application. In fact he did so, as I could prove with the transcript lost to his laches. Application of New York substantive law is *res judicata*, *Matter of Proceeding for Support, Etc.*, 405 NYS 2d 225, 227, #2, 3.

Plaintiff-Appellee has not alleged that his desertion "continuing" all these years – without a separation agreement – would alter the finality of New York's decision and entitle him to "no-fault" divorce under New York law. He alleges quite the contrary, that New York *requires* a separation agreement.

" . . . The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates." *Garrett v. Moore-McCormack Co.*, 317 US 239, 245

Plaintiff-Appellee and I lived together in New York for many years. Sierra was born there. He willfully deserted there when she was only three. His New York lawyers drew up the separation agreement he presented to me in our home there, and I refused to sign it, knowing that to be an act of consequence under New York law. We both relied on that law in this continuing transaction, *Restatement of the Law, Conflict of Laws*, 2d, sec. 6, #4; sec. 133, p. 336. He is still a New York resident. New York is the "center of gravity" of this entire situation, *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F 2d 710, #6, 7, and therefore New York substantive law will control, even when Plaintiff-Appellee is outside New York: *Restatement of the Law, Conflict of Laws*, 2d, sec. 9, p. 31, 35-36; *Bell et al. v. Hood et al*, 327 US 678, 681, "the party who brings a suit is master to decide what law he will rely upon." See also *Milliken v. Meyer*, 311 US 457, 463; *Hutner v. Greene*, 734 F 2d 896, #2; *Garr v. Lerner*, 528 F Supp. 630, 632; *Auten v. Auten*, 124 NE 2d 99, #2, 3; *Bondi Brothers v. Holbrook Grocery Co.*, 96 Vt. 160, 163; *Langdon v. Young*, 33 Vt. 136, 140.

*Greenberg v. Greenberg*, 218 App. Div. 104, enjoins the husband from Mexican divorce action and, at 109, cites him for impudent and brazen behavior

" . . . in the effort to be rid of his wife by a divorce which, upon the same facts, he could not hope to obtain in this state."



Other New York injunctions against proceedings in sister states to evade New York's substantive divorce law include: *Lowe v. Lowe*, 244 NYS 2d 847 (where the desertion had taken place in New York, as in *Zweig*); *Palmer v. Palmer*, 50 NYS 2d 329-330; *Oltarsh v. Oltarsh*, 43 NYS 2d 901; *Adams v. Adams*, 42 NYS 2d 266; *Selkowitz v. Selkowitz*, 40 NYS 2d 9, citing *Williams v. North Carolina*, 317 US 287; *Ashkenaz v. Ashkenaz*, 41 NYS 2d 388, 389. See also *Cole v. Cunningham*, 133 US 107, citing *Vail v. Knapp*, 49 Barb. 299, 305, which enjoined New York citizens from proceeding in Vermont in evasion of the laws of New York; . . .

" . . . it was quite competent for (Plaintiff-Appellee) to institute legal proceedings . . . within (New York) . . . That was a matter of election upon (his) part, and when (he) invoked the aid of the jurisdiction of the courts administering the law in such state, (he) became bound by such law." *Moore v. Hanover National Bank*, 80 NYAD 71

If absence of a separation agreement controlled in New York, then

" . . . her status . . . having been adjudicated . . . by the court cannot be regarded as something 'inchoate,' but rather as a vested right which may not be taken away arbitrarily." *Abelson v. Abelson*, 298 NYS 2d 381, 390

"In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law." *Chevron Oil Co. v. Huson*, 404 US 97, 111, note 2, quoting Justice Harlan in *Bournias v. Atlantic Maritime Co.*, 220 F 2d 152, 154



If, as Plaintiff-Appellee now contends, a written separation agreement recorded in the manner of a deed under NY DRL 170(6), PC 161, is intended to affect decision of the issue, it is substantive law and controls in the forum: *Restatement of the Law, Conflict of Laws*, 2d, sec. 133, p. 365-366; sec. 138, comment c, p. 384; *Guaranty Trust Co. v. York*, 326 US 99, 108-109. *Central Vermont Railway v. White*, 238 US 507, 511-512, holds that the question of fault is substantive, and that matters are substantive when they are legislative in nature. *Order of Travelers v. Wolfe*, 311 US 586, reversed to require Full Faith and Credit to Ohio statute, because of a new and different liability in the forum. See also *Willametz v. Munch*, 311 NYS 2d 765, #2. *Home Insurance Co. v. Dick*, 281 US 397, 410, #6, rejected, on due process grounds, the contention that a state may refuse to recognize rights acquired elsewhere that violate its public policy, where rights and obligations are involved. *John Hancock Life Insurance Co. v. Yates*, 299 US 178, #2, 3, 5, rejected application of the forum statute and required Full Faith and Credit to New York's, where the parties had by their conduct subjected themselves to New York statutory conditions. *Allstate Insurance Co. v. Hague*, 449 US 302, allowed application of forum statute erroneous under conflict-of-laws doctrine to pass only because no unfairness resulted to parties and the sovereignty of the proper state was not threatened. In *Zweig* we have manifest unfairness to me, and direct reversal of New York's decision, against its sovereignty over its own citizen and the res h<sup>e</sup> submitted there. *Nevada v. Hall*, 440 US 410, permitted California to apply its own law against Nevada in an accident on California highways only because it found no "obnoxiousness of

policy" between the two states – and, at 421, noted that with regard to judgments the rule is entirely otherwise.

"States enjoy no flexibility in deciding whether they will recognize foreign judgments." *Farm-land Dairies v. Barber*, 489 NYS 2d 716, #7

Since Plaintiff-Appellee now argues obnoxiousness of policy between New York and Vermont regarding separation agreements, he necessarily highlights the inconsistency between the two present *Zweig* decisions, and thereby concedes forum-shopping: *Restatement of the Law, Conflict of Laws*, 2d, sec. 6, #6; *Montana v. US*, 440 US 147, 153-154; *Synanon Church v. US*, 820 F 2d 421, 426; *Statter v. Statter*, 163 NYS 2d 13, 17 – especially since the inconsistent decision destroys the marital status adjudicated; *Wolcott v. Hutchins*, 245 F Supp. 578, 581; *White et al. v. White et al.*, 68 Vt. 161, 167; Appellants brief, p. 38-40.

Vermont should defer to New York law under *Bank of Bellows Falls v. Rutland & Burlington Railroad Co., et al.*, 28 Vt. 470, 477. Local policy, if different, should not control unless the law of New York requiring a separation agreement, however unlike Vermont's own, stands

" . . . contrary to pure morals and abstract justice, or its enforcement would be of evil example and harmful to its people." *Brown, Adm'r, v. Perry, Jr. et al.*, 104 Vt. 66, 73, #10, 11, 14

New York's conflict rule is similar. *Schultz v. Boy Scouts of America, Inc.*, 491 NYS 2d 90, #6, required offense to local policy in such high degree that it allowed the victims of sexual abuse that took place in New York to go uncompensated, in deference to New Jersey's charitable immunity statute.

Any conflict of substantive law or policy between New York and Vermont in the inconsistent *Zweig* decisions starkly underscores the substantive effect of 15 VSA 592 amended, invoking the bar of 1 VSA 213 and 214. Everyone has always known that divorce plaintiffs seek other states in order to evade the substantive laws of their own. They usually accomplish their purpose by establishing technical residency in the forum, but Plaintiff-Appellee does not have that leg to stand on. Retroactivity is not permitted where it has substantive effect: *Greene v. US*, 376 US 149, 149(b), 160; *Guaranty Trust Co. v. York*, 326 US 99, 108-109; *Claridge Apartments Co. v. Comm'r*, 323 US 141, 158, 164; *Union Pacific R. Co. v. Laramie Stock Yards*, 231 US 190, 199; *Winfree v. Nor. Pac. Ry. Co.*, 227 US 296, 301-302; *Bournias v. Atlantic Maritime Co.*, 220 F 2d 152, 154; *Abelson v. Abelson*, 298 NYS 2d 381, 389, concerning "no-fault" divorce and separation agreements.

\* \* \*

VII. . . . I AM PREJUDICED LEGALLY BY DESTRUCTION OF THE NEW YORK TRANSCRIPT, AND BY LENGTH OF TIME ITSELF HELD BOTH AS A NEW CAUSE OF ACTION AND A "STANDARD OF LIVING" TO DENY ME ALIMONY.

\* \* \*

None of Plaintiff-Appellee's citations involves efforts to undermine the finality of prior decree – but New York applies laches in divorce most especially in such circumstance: *Kennedy v. Kennedy*, 423 NYS 2d 198; *Schuman v. Schuman*, 137 NYS 2d 485 (despite a "recent discovery"

alleged); *Marcus v. Marcus*, 90 NYS 2d 830, 832, 838, 843; *Senor v. Senor*, 272 App. Div. 306, 308, #8; *Gioia v. Gioia*, 245 App. Div. 373, delay of only 13 months in seeking to vacate the prior judgment.

. . . *Marcus*, at 837, *Kennedy*, #2, and *Duerner v. Duerner*, 61 A 2d 307, 308, find lack of a transcript and prejudice of defense. *US v. Kramer*, 289 F 2d 909, #6, notes that estoppel looks not only to the pleadings in the prior action, but to the transcript, as does *Bronxville Palmer Ltd. v. State*, 277 NYS 2d 402, #6, 11, since issues not apparent in the pleadings may have been litigated. Despite the available record of the New York decision, Plaintiff-Appellee continues to deny that "irreconcilable separation" was heard and determined in New York - docketing statement, II. So the loss of the New York transcript is indeed prejudicial; doubly so since Plaintiff filed appeal in New York on the very issue of "dead marriage," incurring the burden to supply the transcript himself in order to litigate further.

"To now permit a de novo litigation of these causes of action would import a reward for delay and court switching, and negate the entire proceedings (prior)." 64 *West Park Avenue Corp. v. Parlong Realty*, 354 NYS 2d 342, 348

*Gahn v. Gahn*, 104 A 2d 862, barred for laches despite the "continuing" ground of constructive desertion, noting at #2 impairment of proofs.

\* \* \*

The *Zweig* trial court did not permit me to brief or argue affirmative defenses asserted in my Answer, laches among them.

\* \* \*

IX. VERMONT CANNOT ENFORCE ALIMONY ABSENT PERSONAL JURISDICTION OVER PLAINTIFF'S EMPLOYER, PROTECTION GUARANTEED BY STATUTE TO VERMONT RESIDENTS. RESIDENCY OF SPOUSE WHOLLY UNRELATED TO PURPOSE OF ALIMONY STATUTES. *LEVERSON V. CONWAY* OVERRULED ON JUST THIS POINT. VERMONT SHOULD NOT TAKE JURISDICTION.

Plaintiff-Appellee's discussion of 15 VSA 592 amended fails to mention 15 VSA 780-790, which affords maintenance enforcement protection through jurisdiction over the employer of the liable spouse. Under the Constitutions of Vermont and the United States, Vermont must make this protection available to *all* Vermont residents in the circumstance of divorce. 15 VSA 592 amended is not to be examined in isolation. The purpose of our alimony statutes is to assure compensation for parties not at fault from parties who have offended the marriage, and to assure relief for the party who suffers the more severe economic consequences of the dissolution, with a view towards the standard of living prior to separation, and provision for the services of the custodial parent, 15 VSA 752. Residence of spouse has no rational connection whatsoever to any of these purposes. See *Boone v. Boone*, 134 Vt. 128, 130; *Tetreault v. Tetreault*, 148 Vt. 448.

"The statute is silent on the extent to which it is intended to reach a respondent who is out of state without personal jurisdiction over the employer; however, any order issued by the Vermont court could not be enforced." VRCP 80, 1985 amendment, RN, MDT 23/2-23

Full Faith and Credit will not avail for enforcement: *Hanson v. Denckla*, 357 US 235; *Tiedemann v. Tiedemann*, 172

App. Div. 819, 824-825; *Alton v. Alton*, 207 F 2d 667, 676. The Zweig trial court admitted as much, S51-88 TT 55-56.

Even if it could, Equal Protection could still not be afforded under 15 VSA 780-790 *all by themselves*, and it is *that* protection which must be available within the power of Vermont alone, to *all* Vermont residents who are qualified in terms of the purposes of the alimony statutes, *Margaret E. Callahan's Estate*, 115 Vt. 128, #1, 8. Since it cannot enforce its own policy, Vermont should not take jurisdiction: *Bank of Bellows Falls v. Rutland & Burlington Railroad Co. et al.*, 28 Vt. 470, 479-481; *Restatement of the Law, Conflict of Laws*, 2d, sec. 77 (2)(b).

Plaintiff-Appellee is ill-advised to rely on *Leverson v. Conway*, 144 Vt. 523. That case was specifically overruled, on exactly the point of residency discrimination, in *Williams et al. v. Vermont et al.*, 472 US 14, 17-18; 472 US 1014.

\* \* \*

X . . . Plaintiff-Appellee simply excluded from his documentation all factors of both certification and substance going to res judicata and Full Faith and Credit under 28 USC s. 1738, VRCP 44 and 79. "A motion to dismiss challenges only what appears of record," *Chapman v. Chapman*, 118 Vt. 120, #8 – and all that appeared was that absence. Since VRCP 4(a) requires Plaintiff to deliver "appropriate copies," his case fails as well for insufficiency of process and service. The error is not harmless, but jurisdictional, just as it was in S98-87. In addition, it cost me \$178, PC 185, to supply Plaintiff-Appellee's burden in order to qualify for Full Faith and Credit under 28 USC s. 1738 and VRCP 44.

\* \* \*



XI. AFFIRMATIVE DEFENSES WERE NOT RAISED OR HEARD IN THE MOTION TO DISMISS. INCONSISTENT POSITION IN PLAINTIFF-APPELLEE; PREJUDICE TO DEFENDANT-APPELLANT. S98-87 DIRECTION BY HONORABLE JUDGE MEAKER RES JUDICATA.

Plaintiff-Appellee, now adopting the error of the trial court, asserts that my Answer, PC 137-155, is the same as points raised in my Motion to Dismiss, But on the Motion to Dismiss I argued only the bar of 1 VSA 213 and 214 against application of 15 VSA 592 amended; Equal Protection; and failure of Plaintiff to provide exemplified documentation as required. . . .

I did not argue the merits or authority on Full Faith and Credit, res judicata, or collateral estoppel – instead I advised the court that those issues would be coming up in my Answer and that, therefore, exemplified documentation of the New York action was required in Plaintiff, with showings of jurisdiction and substance according to 28 USC s. 1738, VRCP 44 and 79, sufficient to base my Answer thereon.

Plaintiff-Appellee is judicially estopped to take the position now directly opposite to that he urged at PC 100, pp. 2, 3; PC 104, pp. 2. Then he said that I could *not* argue res judicata and other affirmative defenses in a Motion to Dismiss, and that they should “properly” be left as affirmative defenses and/or for resolution after presentation of evidence at trial. The court should have advised me if it intended to hear affirmative defenses on the Motion to Dismiss, especially since Plaintiff had specifically objected.

I got the ol’ switcheroo, *Davis v. Wakelee*, 156 US 680, 689. Relying on Plaintiff-Appellee and on VRCP 3(c),

12(h), and 83, I withheld my affirmative defenses until the proper point – only to come up short against a ruling that I *had* presented them when I refrained from doing so, and therefore I would not be heard.

Plaintiff-Appellee maintains a deafening silence upon the direction of Honorable Judge Meaker at S98-87T 13/15-20; 14/8-11, that the parties were to present law on *res judicata* to the trial court. That direction is *res judicata* and not within the discretion of the S51-88 court, 65 HLR p. 836.

\* \* \*

I did not raise Failure to State a Claim upon which relief may be granted in my Motion to Dismiss, because that is a question of law which must be decided after, not before, the court assumes jurisdiction, *Bell et al. v. Hood*, 327 US 678, 682, #3. I reserved it for my Answer, PC 137, pp. 4; PC 154, pp. 75, and asked that affirmative defenses be heard before trial at PC 137 pp. 4. VRCP 12(d) requires that Failure to State a Claim *must* be heard and determined before trial on application of any party, unless the court orders it deferred until trial. No such order was made, and hearing was denied both at trial and afterwards, PC 242-243 B, PC 264-265, S51-88TT 75/1-10.

*Res judicata* and collateral estoppel are affirmative defenses which must be pleaded, not aspects of a motion to dismiss: *Blonder-Tongue Laboratories v. University Foundation*, 402 US 313, 350; *Avery v. Bender*, 126 Vt. 342, 346-347, #17, 18. Full Faith and Credit can be decided properly only after the court has jurisdiction, hence not on a motion to dismiss: *Richards v. Richards*, 1 App. Div. 2d 866, 149 NYS 2d 88; *Day v. Day*, 231 NYS 2d 973;

*Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F. 2d 710, 714-715, quoting *Bell v. Hood*, 327 US 678, 682.

*Estate of Young v. Williams*, 810 F. 2d 363, 366, Vermont, holds that *res judicata* can be raised in a pre-trial motion only when "the defense's existence can be judged on the face of the complaint." But in *Zweig*, Plaintiff-Appellee had carefully excluded from the complaint and his documentation New York's opinion, judgment, and his appeal showing the issue of irreconcilable separation, jurisdictional recitation and evidence, and exemplification required under 28 USC s. 1738, VRCP 44. See also *Chapman v. Chapman*, 118 Vt. 120, #8.

XII. DUE PROCESS OF LAW VIOLATED IN THE TRIAL COURT'S DENIAL OF DISCOVERY, AND OF BOTH MEMORANDA OF LAW AND HEARING OF AFFIRMATIVE DEFENSES.

\* \* \*

As far as affirmative defenses are concerned, "The court has discretion to refuse a request for argument and decide the matter on memoranda." VRCP 78, 1979 amendment, RN p. 339

Nothing suggests that the court may refuse both Memoranda and a hearing, as in *Zweig*. *Okemo Mountain* is off the mark – the *Okemo* memorandum was sought only after hearing, with a demand that findings be withheld. I sought continuance for memoranda immediately upon filing my Answer, to prepare the court for hearing and decision. Under *Bowen v. State Com'n of Correction*, 477 NYS 2d 961,

"Giving judgment to one side without an opportunity to the other side to be heard is a nullity."

## XIII. CONCLUSION

Plaintiff-Appellee did not allege constructive abandonment in New York exclusively – or even primarily – in its sexual sense. He alleged – falsely – that my conduct forced him to leave, PC 60-61, #16, PC 63 #20, 21. His alleged “separation” was necessary to his New York case upon DRL 170(1), the cruelty ground, to attempt to show it “unsafe or improper” for him to stay.

\* \* \*

His New York action was entirely about his “separation.” He laments its length – and the denial of “his divorce” as though that divorce were his pre-existing right. He is like the fellow who killed his parents and then solicited the sympathy of the court because he was an orphan. New York, his home state, whose law and decision he invoked, doesn’t buy it. I lament the violation of our marriage, and I reject willfull desertion. It is bad for women and children, bad for men and for society, and against public policy. It’s not right. Nowadays it seems people just can’t be bothered to try.

If Plaintiff-Appellee really is still unclear on my objection to this divorce, I say again that I resist the found authority of the comrades of the Revolutionary Union against our marriage and against our personalities, PC 194, #4; S51-88TT 59/20-65/2; 69/6-70/7; 71/10-73/5. I want to “be there” as Michael’s wife, if and when he may again be willing to entertain our humanity.

Times change. It used to be hard to get Full Faith and Credit to the decisions and statutes of sister states that *granted* divorce. Now, it is hard to get Full Faith and

Credit when New York *denies* divorce. Nevertheless, now, as before, the Full Faith and Credit clause should in the end accomplish its fundamental and enduring Constitutional purpose.

\* \* \*

## APPENDIX B

§ 170

## DOMESTIC RELATIONS LAW

Art. 10

\* \* \*

In addition to a justification defense, it seems clear that a defendant in an abandonment divorce action may interpose any appropriate objections specified in CPLR 3211(a), including such defenses as pendency of another action, lack of capacity of plaintiff to sue, *res judicata*, and lack of personal, *rem*, or subject matter jurisdiction.

\* \* \*

Appellant's Supplementary Citations, April 23, 1990

(Caption Omitted In Printing)

\* \* \*

*Royal Arcanum v. Green*, 237 US 531, 1915, at 545, 546; *First National Bank v. United Air Lines*, 342 US 396, 1952, Jackson concurrence at 400; *Roseman v. Fidelity & Deposit Co. of Maryland*, 154 Misc. 320, 1935, (New York), at 323-325; and *McCluney v. Joseph Schlitz Brewing Co.*, 649 F. 2d 578, 1981 (Missouri), all bear on application of New York law in *Zweig*, as required by Full Faith and Credit.

\* \* \*

*Royal Arcanum* specifically discusses error in the assumption that a prior judgment in a Sister State

was "irrelevant" based on the equally erroneous view that the law of that state would not be applicable, and points out that Full Faith and Credit to a judgment is the exact equivalent of Full Faith and Credit to the first state's law, the two being inseparable, Appellant's brief p. 21.

*McCluney* notes at #7 and p. 581 that a party's change of residence after the decisive transaction doesn't alter applicability of the first state's law.

B. With regard to "continuing" cause of action:

*Ball v. Ball*, 76 SW 2d 71, 1934, Arkansas, #2, #3, p. 71, discusses and applies Full Faith and Credit and res judicata to a "continuing" separation with no change of circumstances since the first judgment, Appellant's Brief p. 23, 51; Appellant's Reply Brief p. 3, 4, and at hearing.

*Griffin v. School Board*, 377 US 218, 1963, #1, p. 226, holds the same cause of action in a "continuing effort to circumvent" prior holdings, Appellant's Brief p. 40, 50; Reply Brief p. 1, 17-19, and at hearing.

*Catrone v. Suffolk Downs, Inc.*, 683 F. Supp. 302, 1988, Massachusetts, #12, p. 310, discusses res judicata and same cause-of-action with regard to a single course of action decided earlier and continuing, Appellant's Brief p. 22, 50; Reply Brief, p. 1, and at hearing.

\* \* \*

C. With regard to jurisdiction, *Thrasher v. US Liability Insurance Co.*, 278 NYS 2d 793, 1967, #1, 2, 6, p. 798, relies on *Hunt* 90 years later on the point that a plaintiff's Failure to State a Claim on which Relief can be Granted goes only to merits, not jurisdiction: Appellant's Brief p. 33, Reply Brief p. 9, and at hearing.

D. With regard to jurisdiction, *A/S J. Ludwig Mowinkels R. v. Dow Chemical Co.*, 307 NYS 2d 660, 1970, at 663, holds that jurisdiction as a procedure cannot be used



to alter substantive rights, Appellant's Reply Brief p. 19, and at hearing.

- E. On materiality of the litigation of "desertion" versus "dead marriage" in New York, *Bloom v. Bloom*, 384 NYS 2d 281, 1976, Appellant's Brief p. 27; Reply Brief p. 12.
- F. *Colgate v. Harvey*, 296 US 404, 1935, #8, 9 and at 425, held that a Vermont residency classification violated Equal Protection. (It's "national citizenship" concept, later overruled, doesn't apply in *Zweig*.) Appellant's Brief p. 79; Reply Brief p. 25; and at hearing.

\* \* \*

- H. At hearing, on Equal Protection, the quote "They do not enter the courts upon equal terms" is from *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 US 150, 1897, at 153.
- I. *Douglas v. New Haven R. Co.*, 279 US 337, 1928, at 385 and 387, discusses the point at hearing that a state may decline jurisdiction when plaintiff's residence, and the occurrence involved, are in another state, with reference to overcrowded courts in the forum.

\* \* \*

- L. The hearings of the Vermont House Judiciary Committee referred to at oral argument were on S. 80, 4/7/69 and 6/3/69, concerning counselling and the encouragement of reconciliation in "no-fault" divorce; and on S. 20, 1/27/81, amendment of 15 VSA 592 to give out-state parties access to Vermont marital property since "practice" didn't let them counterclaim.
- M. *Ferrer v. Ferrer*, 58 NYS 2d 621, 1945, holds abuse of discretion not to hear affirmative defenses of res judicata and Full Faith and Credit prior to trial on the merits, Appellant's Brief p. 8, 9; Reply Brief, p. 27, 29.

\* \* \*

MOTION FOR REARGUMENT, June 14, 1990, excerpts:

(Caption Omitted In Printing)

\* \* \*

II. DUE PROCESS REQUIRES FORUM RESIDENCE IN DIVORCE PLAINTIFF: The Court appears to overlook this question and authorities submitted thereon, Appellant's Brief p. 39-40, 69. If the Court disagrees with Appellant's reasoning, it should present its own for purposes of review of the Federal question.

III. CONFLICT OF LAW: the Court appears to overlook Appellant's briefing of authorities in Conflict of Laws, Appellant's Brief p. 14 IV, 16-17, 18, 21, 25-26, 30-31, 32-33, 34, 38-40, 44-47, 58, 81-83; Reply Brief p. 1, 6, 7, 14-19, Appendices I and K; Answer, PC 138 #7, #9, PC 144-145 #32-34, #37, PC 146 #40, PC 148 #49, #51, PC 149 #56-58. If the Court disagrees with Appellant's reasoning, it should present its own for purposes of review of the Federal question.

IV. FULL FAITH AND CREDIT: declining to consider Full Faith and Credit, the Court had denied it. If the Court disagrees with Appellant's reasoning in Appellant's attached supporting brief, it should present its reasoning for purposes of review of the Federal question. The Court's decision should also note that, pursuant to 28 USC s. 1738, Appellant submitted, and the trial court admitted, exemplified copies of the following from New York Supreme Court Divorce Action Index No. 35892-79, New York County, State of New York: Affidavit of Service; Amended Complaint; Amended Verified Answer and Counterclaim; decision of Blangiardo, J.; Judgment; Notice of Appeal and Pre-Argument Statement; Appellate

Full Faith and Credit renders New York's law inseparable from its judgment.

The Court appears to have substituted mere comity for the Full Faith and Credit command. Against *Russo v. Russo*, 62 NYS 2d 514, excerpted at p. 15, Reply Brief, it has arrived at a conflicting determination by considering a Vermont res in *Zweig* to be independent of the New York res, and has inadvertently adopted the reasoning of *Haddock v. Haddock*, 201 US 563. *Haddock*, at 570, held Full Faith and Credit not obligatory on ground of public policy in the forum, and, at 577-581, that the marital status had dual existence in the states of residence of each party. *Williams I* firmly overruled *Haddock*, on these points, at 317 US 293, 299-300, 307.

New York, obliged in our original action there to take notice of Vermont law without request, Rule 4511, Reply Brief Appendix I, applied its own law in conformity with *Alton* because of Plaintiff's New York residency and the occurrence thereof the conduct causing estrangement. Since New York would not now permit collateral challenge in *Zweig* on the basis of Vermont policy, Vermont cannot either.

After the Court grants Full Faith and Credit first, with full, generous and acknowledged deference to New York's statutory policy, it should then move on to assess claim preclusion strictly on the basis of the factual transaction presented in New York. The factual transaction approach insures fidelity to the Constitutional command. It serves to restrain the influence of local policy underlying "grounds" and "evidence," and to render forum-shopping futile, as Full Faith and Credit intends.

## V. TRANSACTION.

Res judicata precludes a renewal of issues actually litigated and resolved in a prior proceeding . . . which arise out of the same 'factual grouping' or transaction . . . a claim or cause of action is coterminous with the transaction regardless of the number of theories or variant forms of relief . . . *Braunstein v. Braunstein*, 497 NYS 2d 58, Reply Brief p. 1, 3

Plaintiff's New York complaints set out his 1974 marital departure, and the New York court found that he had left "never to return." In Vermont he urges "separation" in spring, 1974, continuing uninterrupted to the present, and resumption of relations improbable. The unit (1974- "never") conforms to the expectations of both parties and all courts, terminable if and when he does return in good faith. Until then, it is one in time, space, origin, and motivation. To hold that only the last six months "counts" splits Plaintiff's cause of action, subverts the fundamental rule that a party's pleadings must be construed against him, denies finality of decision and repose to litigants therein, and permits forum-shopping.

Citing the *Slansky* case in my favor, the Court appears to overlook *Aubert v. Aubert*, 129 NH 422, (1987). *Aubert* at #4 (2) specifically endorses the factual transaction definition of res judicata, and notes at #4 (1) that bar will hold against "evidence or grounds or theories of the case not presented in the first action," (emphasis mine). Appellant at Reply Brief p. 2 has submitted four cases denying divorce on the basis of Full Faith and Credit where plaintiffs asserted new or continuing time, different grounds and evidence: *Harding v. Harding*, 198 US 317; *Ashton v. Ashton*, 94 SW 2d 1033; *Silverman v. Silverman*, 52 Nev.

152; *Lambert v. Lambert*, 229 Ark. 536 (Full Faith and Credit implied). See also *Zizzi v. Zizzi*, 306 NYS 2d 961; *Babcock v. Babcock*, 146 P 2d 279, and *Cox v. Cox*, 163 Ga. 93, which do the same within one state.

Variations in evidence do not destroy identity of claim for preclusion purposes, especially as a negative test, Reply Brief p. 4-5, particularly when the difference in the evidence, such as a separation agreement in *Zweig*, is really a conflict of law and hostile policy question, *Restatement of the Law, Conflict of Laws*, 2d, sec. 138, comment c, Reply Brief p. 17-18. Any impairment by Vermont of my substantive defense of refusal to sign the separation agreement, vested by Full Faith and Credit, itself supports claim preclusion and res judicata, Appellant's brief p. 29, 69; Reply Brief p. 12, and authorities cited, including *Matherson v. Matherson*, 295 NYS 2d 122, #3.

VI. NEVER. "Never to return" should be construed in my favor, as prevailing party in New York. It distinguishes *Zweig* from *Booker* and *Lillis*, which present no suggestion of prior findings addressed to the future, subject to change in circumstances. The Court appears to misapply the *Reynolds* case. Like *Falconi*, on which *Booker* rests, *Reynolds* notes at p. 20 that no findings adverse to Plaintiff had been made in the prior action. The dismissal seemed to be due to insufficient passage of statutory time. But *Zweig* in New York, after six years' "separation," presented no problem of statutory time, and we *do* have findings against Plaintiff, that "never to return" does not warrant diagnosis of irreconcilable separation. Only Plaintiff's return in good faith could close the cause of action litigated, Appellant's Brief p. 49-50, Reply Brief p. 3, and six cases cited, including two from new York; in



addition *Ezell v. Ezell*, 348 SW 2d 592, Mo. 1961; *Gaskell v. Gaskell*, 188 P 2d 352, Okla., 1948; *McGaa v. McGaa*, 438 SW 2d 325, Ark. 1969; Plaintiffs burden to seek resumption of relations under *Buchanan v. Buchanan*, 229 A 2d 832, Del. 1976, *Courtney v. Courtney*, 132 A 2d 576, Md. 1957. Only such event of resumed relations could make *Zweig* resemble *Carratu*, if a new act of separation followed. *Carratu* itself notes at #1 that subsequent claim based solely on the same evidence *would* be barred, and (1974-“never to return”) is that same evidence and sole basis in *Zweig*. Vermont’s findings in 1989-90 are merely cumulative.

*Zizzi*, more on point than either *Booker* or *Carratu*, had denied judicial separation sought on ground of cruelty; the second *Zizzi* decision denied the same plaintiff divorce 6 years later sought on grounds of adultery and abandonment. As in *Brady*, Reply Brief p. 9, and *Zweig*, the findings in the first *Zizzi* case had tended to show plaintiff’s abandonment.

VII. WHAT HAPPENED AT TRIAL IN NEW YORK? Litigation there of allegations not raised in Vermont will not create a different cause of action here. It would have to be the other way around – allegations in Vermont that were not presented in New York. There are none, because willfull desertion and separation without fault are identical for purposes of Full Faith and Credit: *Harding*, US, at 318; *Ashton* at 1035, Appellant’s Brief p. 22-23.

New York’s exemplified notation, “the parties are not in agreement as to the ‘dead marriage’ diagnosis,” proves that the question was controverted. The court resolved it in favor of defendant. It is forever conclusive and binding



on the parties that Plaintiff's 1974 marital departure "never to return" is *not* an irreconcilable separation. "Handwritten insertic..," on this point shows Justice Blangiardo's special concern, whether a typist had left it out or whether he had himself. In whatever case, he made a distinct and particular effort not to let his decision go without it, as Plaintiff acknowledged at MDT 33/17-34/1. So Vermont cannot inquire into any period of time unless and until Plaintiff returns, or into whether or not return is reasonably probable, Appellant's Brief p. 54, Reply Brief p. 10, and cases cited, including *Laing v. Rigney*, US, at 542; *Everett*, US, at 213; *Hunt*, New York, and *Forrest v. Fey*, Illinois, #1, 168-169, all divorce.

Acknowledging operation of the "dead marriage doctrine" in New York's cruelty ground, this Court has sustained its materiality. "Dead marriage" did not have to stand alone. *Lambert* at 823 (1-3), Reply Brief p. 2, 11, holds continuing desertion barred as *res judicata* by prior decree in Mississippi that denied divorce on the cruelty ground, even though plaintiff couldn't have alleged desertion independently as a statutory ground because not enough time had passed. Attachment of "dead marriage" to the cruelty ground goes only to merits, not jurisdiction, and is beyond inquiry. It does not put the transaction unit (1974-"never") beyond the scope of the cause New York determined, *Carr*, New York, #6; *Coleman*, 1117; *DuPont*, #6, all divorce, Reply Brief p. 9-10.

. . . one spouse may show that misconduct by other spouse . . . is real cause of seeking divorce other than alleged cruel and inhuman treatment, and to such extent evidence is material and necessary to divorce action based upon cruel and

inhuman treatment. *Bloom v. Bloom*, 384 NYS 2d 281, 1976, supplemental citations

Once I had counterclaimed his willfull abandonment, the burden of proof shifted to Plaintiff to show my fault, "dead marriage," or a separation agreement. We did then and there litigate my refusal to sign the separation agreement he had presented six years earlier, as well as our relationships with our present companions, as my sworn affidavit upon my Answer attests. Plaintiff has not denied that litigation by either testimony or affidavit.

If the Court now rests its decision on factual determination of what was or was not testified in New York, it necessarily reversed the Vermont trial courts ruling that what happened at New York trial is "irrelevant," S51-88 TT 31/8-33/21. It should either accept the preponderant evidence of my uncontroverted sworn affidavit, or else dismiss Plaintiff's action for laches, due to destruction of the reporter's notes during eight years' lapse of time. My defense is prejudiced by the impossibility of recovering the transcript, which would have been Plaintiff's burden in the first place in the New York appeal he abandoned: Appellant's Brief p. 14 V, 18, 29, 56-58, 60, 64; Reply Brief p. 11, 16, 20-23 (including New York's laches which Vermont applied in *Taddeo v. Taddeo*, 141 Vt. 120, Reply Brief p. 20-21).

\* \* \*

MOTION FOR STAY OF EXECUTION OF JUDG-  
MENT . . . June 26, 1990, excerpts;

\* \* \*

authorities cited. Resting its decision on 15 VSA 592 amended, however, it necessarily upholds the statute against the constitutional challenge. The Court appears to overlook *Lillis v. Lillis*, 563 P 2d 492, #1, 3, 4, 494. If the Court disagrees with Appellant's reasoning as briefed and argued at oral hearing, it should present its own for purposes of review of the Federal question.

\* \* \*

Motion for reargument – supporting brief:

# I. RETROACTIVE EFFECT OF 15 VSA 592 AMENDED.

\* \* \*

Since New York's "no-fault" divorce law affords me the defense of my refusal to sign the separation agreement Plaintiff presented in 1974, but Vermont's law does not, 15 VSA 592 amended has altered my substantive rights, liabilities, and legitimate legal expectations. This in itself bars retroactive effect, *Myott v. Myott*, 149 Vt. 573, Appellant's Brief p. 64-65. Alteration of the legal effect of actions taken prior to amendment presents a due process issue, in *Carpenter v. Dept. of Motor Vehicles*, #3, Appellant's Brief p. 68-69. *Mandigo*, 128 Vt. 446, Appellant's Brief p. 66, held the divorce parties to the fault-oriented separation grounds in effect at the *beginning* of their continuing separation, though fault had been eliminated meanwhile.

Since the Court declines to apply New York's "no-fault" divorce law (requiring a separation agreement), and relies instead upon Vermont's, which does not, it appears contradictory for the Court to resort to the *Gleason* case in New York for guidance as to retroactively

– instead of to 1 VSA 213, 214. The Court takes *Gleason* to hold that *nonretroactivity* must affirmatively appear in the statutory language. Vermont's rule is the opposite; *retroactivity* must affirmatively appear, *Carpenter* at #2, Appellant's Brief p. 68. Unless the Court enunciates its principles as to which law will govern, there is an appearance of prejudice, of picking and choosing authority from either state that will favor Plaintiff; rejecting authority in either that favors Defendant.

But the Court also appears to overlook the fact that *Gleason* itself, 308 NYS 2d 347, #6, 356, expressly *forbids* retroactivity where separation agreements are concerned.

II. DUE PROCESS REQUIRES FORUM RESIDENCE IN DIVORCE PLAINTIFF. The *Alton* majority holds violation of due process under Amendments 5 and 14 of the United States Constitution where divorce is granted to nonresident plaintiff, Reply Brief p. 14-15. Although neither *Alton* party was resident, the court's reasoning squarely requires residency in plaintiff specifically, #9, 674-675. The US Supreme Court granted Certiorari at 347 US 911, in February, 1954, which postdates both of Plaintiff's cases *Gee* and *Davidson v. Helm*. Subsequently, *Alton* was mooted.

Requirement of domicile in plaintiff is clearly foreshadowed in *Williams v. North Carolina*, 325 US 226, 238, 256:

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a

bona fide domicile in the state of the court purporting to dissolve a prior legal marriage. p. 238, (emphasis mine).

In *Sherrer*, 334 US 343, 362-363, Justice Frankfurter dissented because divorce had been granted. But since New York denied divorce in *Zweig*, his view applies consistently with the *Sherrer* majority to us. He deplores

... citizens who do not change their domicile, who do not remove to another state, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back.

*Sosna v. Iowa*, 419 US 393, at #2(a), 406, upholds durational residency requirements for divorce plaintiffs to insure each State's paramount interest in insulating its decrees from collateral attack like that in *Zweig*, and to "avoid officious intermeddling." *Makres v. Askew*, 500 F 2d 577, #3, calls it a "compelling interest."

III. CONFLICT OF LAW. Conflict of law principles operate even in the absence of prior litigation. Acknowledging the "contrast" between New York and Vermont law with regard to the separation agreement required by New York's Domestic Relations Law sec. 170 (6) for "no-fault" divorce, the Court's formulation that no separation agreement is "present" in *Zweig* overlooks the fact that the issue of a separation agreement is vigorously present. Plaintiff testified (S51-88TT 27/7-17, 28/20-30/8, Appellant's Brief p. 2, 18) that, in New York in 1974, on advice of his attorney, he presented me with a separation agreement which I refused to sign. My sworn affidavit, PC 156 #3, upon my Answer, PC 140 #15, PC 141 #20 a, PC 147-147 #41 b attests that this transaction was litigated in

the New York action. Even if it was not, Vermont should still apply New York's law instead of its own, for four reasons:

A. The "contrast" in law concerning separation agreements is statutory, substantive, and outcome-determinative. As such it is not subject to the forum's view of evidence, *Restatement of the Law, Conflict of Law*, 2d, sec. 133, p. 365-366; sec. 138 comment c, p. 384, Reply Brief p. 16, 17-18. The Full Faith and Credit clause applies to sister states' "public acts" as well as to judgments.

B. Plaintiff remains a New York resident. The marital res follows the domicile of plaintiff, *Carr*, New York divorce, Reply Brief p. 14.

However harsh and unjust (New York's) divorce laws may be thought to be, (Plaintiff is) bound to obey them while retaining residential and domiciliary ties in that state. *Williams v. North Carolina*, 325 US 226, 241

C. New York is the "center of gravity" of this situation. Everything happened there. The Hastie dissent in *Alton*, which *would* permit divorce where only one party is resident, would also require application of the substantive law of the statute where the parties were living at the time of the conduct producing the estrangement, Reply Brief p. 14-15. *Restatement of the Law, Conflict of Laws*, 2d, sec. 6, #3, #4, #6; sec. 9 p. 31, concurs; #4 because we based our legal expectations on my refusal to sign the separation agreement.

D. Application of New York's law is fully warranted by Vermont conflicts cases, Reply Brief p. 19. As a deterrent to willfull abandonment, and in encouragement



of counselling or economic settlements, a separation agreement requirement can hardly be considered harmful, contrary to morals, or of evil example.

*Goodrich on Conflicts*, 4th ed., 1964, Chapter 1, sec. 11, cautions against "provincialism" and "parochialism" in the choice of forum law, and notes the particular harshness of such choice upon defendant, who cannot select the forum and who has a defense in the foreign law. *Goodrich* notes at p. 144 that "egregious errors in choice of law constitute a violation of the due process clause." On this point see *Phillips Petroleum v. Shutts*, 472 US 797, 1984, #3, 820-822.

My Vermont residency, pleaded as an item in Plaintiff's New York causes of action, should be construed in my favor as prevailing party there, Appellant's Brief p. 30-31, especially since New York's Rule 4511, Reply Brief Appendix I, required that court to notice Vermont law without request. Application of New York law instead of Vermont's is *res judicata*.

IV. FULL FAITH AND CREDIT. Since New York requires a written, signed, and filed separation agreement for "no-fault" divorce, its policy is hostile to Vermont's. So we now have opposite judgments in two sister states upon the identical fact found in each, as Honorable Judge Meaker warned.

This situation appears to arise because the Court, perhaps misapprehending the relationship between Full Faith and Credit on the one hand, and *res judicata* on the other, has considered the latter first, and to the exclusion of, the former. In so doing, it has permitted itself the "public policy" exception ruled repugnant to Full Faith

and Credit under applicable US Supreme Court divorce cases, Appellant's Brief p. 44-47. When no defect of general jurisdiction appears in exemplified documentation of prior action, the proper procedure is to grant Full Faith and Credit at the outset, with res judicata addressed thereafter.

We afford the Missouri judgment full faith and credit for the purpose of applying the doctrine of res judicata. *Lillis v. Lillis*, 563 P 2d 492, 495.

This sequence should alter the result in *Zweig* because:

A. The public policy exception to res judicata may be suggested in the Court's decision p. 4-5. The differences adduced in "grounds" and "evidence" suggest hostilities of underlying policy.

B. Application of forum policy to override hostile policy in the sister state of prior judgment is repugnant to the Full Faith and Credit clause, especially in divorce. *Johnson v. Muelberger*, 340 US 581, 584, holds, "The faith and credit to be given is not to be niggardly, but generous, full," such that local policy gives way. Full Faith and Credit has nothing to do with which state's divorce policy is better. See the *Williams v. North Carolina* cases, *Sherrer* at (d), 355-356; *Estin* at 545-546.

... necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment (is) the exact equivalent of the assertion of claim of right under the Constitution of the United States to the application of the laws of the (state of prior decision). *Royal Arcanum v. Green*, 237 US 531, 544, Appellant's supplemental cites

Division Acceptance, all with proof of service and the statement of the custodial officer.

V. TRANSACTION: The Court appears to have overlooked the factual transaction definition of claim preclusion, Appellant's Brief p. 21-24; 27-28, 30, 49, 68, 82; Reply Brief 1-5, and authorities cited; Answer, PC 139 #10; PC 146-147 #41, PC 148 #44.

The Court at the bottom of page 1 appears to overlook that Plaintiff's New York grounds were cruel and inhuman treatment and abandonment, New York decision, PC 218 and 223. "Constructive abandonment" in its sexual sense is determined separately at PC 221-222. Pleadings of the separation in Plaintiff's New York complaint are referenced in Appellant's Brief p. 22. At the top of page 5 of its opinion the Court asserts that I cited no authority for the proposition that an action for divorce cannot be brought on grounds present in the years following a prior, unsuccessful suit. The Court appears to have overlooked Appellant's Brief p. 22, *Hunt v. Hunt*, 72 NY 217; *Babcock v. Babcock*, 146 P. 2d 279; Reply Brief p. 2 including *Zizzi v. Zizzi*, 306 NYS 2d 961; *Lambert v. Lambert*, 229 Ark. 536; *Ashton v. Ashton*, 94 SW 2d 1033; *Silverman v. Silverman*, 52 Nev. 152; *Cox v. Cox*, 163 Ga. 93; *Kelly v. Kelly*, 118 Va. 376; *Krzepicki v. Krzepicki*, 167 Cal. 449; *Greer v. Greer*, 142 Cal. 519; supplemental citations, *Ball v. Ball*, 76 SW 2d 71.

VI. NEVER: In its account of my New York counterclaim at the top of page 2, the Court appears to overlook that, in New York, I counterclaimed not only for custody and economic relief, but also for dismissal of Plaintiff's action on ground of his willfull abandonment, PC 214 #11, and

that the New York court found as fact that Plaintiff had left "never to return," PC 219 paragraph 5, and noted that "the parties are not in agreement as to the 'dead marriage' diagnosis. Nor is this Court," PC 22, paragraph 2, Appellant's Brief p. 1, 10E-11, 16, 17, 22, 49, 52, 53-54, 68; Reply Brief p. 3, 6, 8, 9, 13.

VII. WHAT HAPPENED AT TRIAL IN NEW YORK? The Court appears to overlook the appeal that Plaintiff filed and abandoned in New York, urging the "dead marriage" doctrine, PC 231 #8, Appellant's Brief p. 1, 11, 14 I, 18, 25, 31, 35-38, 39, 55-56, 60, 61, 82; Reply Brief p. 5, 6, 9, 11, 17, 22; Appendix D, F, G, H. Basing its decision in part on our relationships with our then and present companions, the Court appears to overlook that they were known to both parties prior to the New York action, S51-88 TT 39/9-15, Trial exhibit G, PC 193, paragraph 3, 6/15/75. Asserting at page 3 of its decision that "defendant has not shown that the New York Court considered that state's no-fault grounds in reaching its decision," the Court also appears to overlook my sworn affidavit, PC 156 #3, upon my Answer, PC 140 #15; PC 140-141 #20, PC 146-147 "41, PC 148 #44-45, PC 149-150 #60, Appellant's Brief p. 29.

IX. EQUAL PROTECTION AND REMEDY AT LAW: The Court refuses to consider the operation and effect of 15 VSA 592 amended in Vermont's divorce statutory scheme, which Defendant asserts to be repugnant to Amendment 14 of the United States Constitution and to Articles 4, 7, and 9 of the Vermont Constitution, because Vermont lacks jurisdiction to enforce its special wage attachment statutes for maintenance and child support against out-of-state employers, Appellant's Brief p. 6, 8, 11, 13, 15 IX and XI, 20, 67, 76-80, 82, 83; Reply Brief p. 5, 23-25, and

Defendant has presented dozens of United States Supreme Court cases in support of points raised below in her Answer and at hearings, among them 19 (now including *Haddock v. Haddock*, 201 US 562, on which this Court's decision appears erroneously to rest) on Full Faith and Credit in divorce. Not one of these dozens, which include equal protection and due process authorities, has been controverted. Defendant has argued, without rebuttal, that *Pennoyer v. Neff*, 95 US 714, *Johnson v. Muelberger*, 340 US 581, and the two cases *Williams et al. v. North Carolina*, 317 US 287 and 325 US 226, originally submitted by Plaintiff, stand in her favor, Appellant's brief p. 33-34. Not one other United States Supreme Court case has been presented against her.

This Court, holding at the end of its decision that the Constitutional issues raised are "decidedly without merit" evidently *has* considered them, and merely withholds its reasoning, as did the trial court.

\*     \*     \*

Therefore no Vermont public policy exception to res judicata can limit the preclusive effect of *Zweig* as determined in New York. Vermont's decision manifests the reasoning of *Haddock v. Haddock*, 201 US 562, 563, 570, substituting mere comity for the Constitutional command, firmly overruled on this point in *Williams et al. v. North Carolina*, 317 US 287, ¶6, 292, 293, 299-300, 304, 307; *Williams et al. v. North Carolina*, 325 US 226, 228.

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MOTION FOR DECLARATION OF FEDERAL QUESTIONS PRESENTED AND DETERMINED,

June 26, 1990, excerpts:

(Caption Omitted In Printing)

\* \* \*

Defendant-Appellant . . . hereby moves the Court to declare on the record the following Federal questions properly presented; to declare the rulings of this Court in passing upon them, and this Court's reasoning as against Defendant's reasoning and authorities as briefed:

I. Is the Vermont Supreme Court's affirmance of the grant of "no-fault" divorce to Plaintiff, pursuant to 15 Vermont Statutes Annotated 551 (7) repugnant to Article IV, sections 1 and 2, of the Constitution of the United States, requiring the states, namely Vermont, to give Full Faith and Credit to the public acts and judgments of sister States, namely, the State of New York?

A. The Court should note that Defendant presented, and the trial court admitted, pursuant to 28 United States Code 1738, exemplified documentation of Divorce Action Index No. 35892, Supreme Court, New York County, State of New York, in which New York dismissed Plaintiff upon the identical state of facts found therein and again in S51-88 in Vermont, namely, Plaintiff's marital departure from Defendant in New York in 1974, "never to return." New York's jurisdiction of the subject matter and the parties is unquestioned, and no defect in that jurisdiction appears.



I. The Court appears to have rejected Full Faith and Credit on the erroneous basis of inquiry into the merits of the New York action, and on the equally erroneous basis of its public policy exception to *res judicata*, as in *Haddock v. Haddock*, 201 US 563. Defendant has argued that Full Faith and Credit to New York's final judgment, and to its hostile divorce policy, is required by the overrule of *Haddock* by the Supreme Court of the United States in *Williams et al v. North Carolina*, 317 US 293, 325 US 226, since no defect appears in New York's jurisdiction over the subject matter and the parties.

II. In applying 15 VSA 551 (7) rather than New York's Domestic Relations Law 170 (6), the Court has necessarily upheld choice of Vermont law over New York's.

III, IV. In applying 15 VSA 592 amended, the court has necessarily upheld that statute permitting divorce action in Vermont by nonresident plaintiffs against Defendant's claim of repugnance to the due process and equal protection requirements of Amendments V and XIV of the Constitution of the United States.

Defendant therefore moves the Court to acknowledge on the record its implicit decision of these Federal questions, and to present its reasoning thereon, to aid Defendant and the Supreme Court of the United States in preparation and determination of her petition for review by certiorari.

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1. Plaintiff characterized his factual cause of action in New York under nominal grounds of Defendant's alleged "abandonment" and "cruel and inhuman treatment," rendering further cohabitation "unsafe and improper," and as irreconcilable separation, "dead marriage," within the scope of New York's cruelty ground.

2. Defendant counterclaimed the same state of facts, asking dismissal thereon on ground of Plaintiff's willfull abandonment of Defendant and their child.

3. New York's dismissal specifically finds that Plaintiff's marital departure - more than 6 years prior to decision - "never to return" does not warrant the diagnosis of "dead marriage."

4. Plaintiff filed appeal in New York specifically upon the "dead marriage doctrine", but abandoned his appeal.

B. Defendant presented proof of the divorce law of the State of New York, which requires, for "no-fault" divorce, either the parties' written, signed, and filed separation agreement, pursuant to its Domestic Relations Law, section 170(6), or prior judgment of separation, section 170(5), itself obtainable on fault grounds only, section 200.

1. Defendant submitted by sworn affidavit that the New York court considered both possibilities, which affidavit stands uncontradicted by either opposing affidavit or testimony.

2. Plaintiff's Vermont testimony on cross-examination established that, in New York in 1974, he presented Defendant with a separation agreement drawn by his New York attorney, which Defendant refused to sign.

3. Defendant presented proof of New York's Civil Practice Law and Rules section 4511, which required the New York Court to notice the divorce law of the State of Vermont without request.

4. Defendant presented the statement of Morris Lorber, dated July 29, 1988, reporting destruction of the stenographic record in the New York action, due to passage of time.

II. Is Vermont's decision to apply Vermont's substantive divorce law to a state of facts arising and continuing in New York, and rejecting application of New York's substantive divorce law thereto, repugnant to principles in Conflict of Law and therefore to Amendment XIV of the Constitution of the United States?

A. Defendant has a complete defense under New York law, namely, her acknowledged refusal to sign the separation agreement.

B. New York's interest in the matter includes the following:

1. Plaintiff is a resident of New York and has been for more than 20 years;

2. Plaintiff's marital departure occurred there and continues there, New York being the state where the parties last lived together;

3. Defendant refused to sign the separation agreement there;

4. Plaintiff brought divorce action against Defendant there upon the same state of facts as that presented in Vermont, and pursued the prior New York litigation to final judgment, with findings adverse to him upon that state of facts;

5. Vermont's decision has permitted Plaintiff to evade the substantive provisions of the divorce law of his domiciliary state.

III. Is 15 Vermont Statutes Annotated 592, amended effective February 12, 1981, to permit nonresident divorce plaintiffs to bring action against resident defendant spouses, repugnant to due process under Amendments V and XIV of the Constitution of the United States, especially when Vermont applies its own law without presenting principles by which to weigh the interests of New York?

IV. Is 15 VSA 592 amended additionally repugnant to equal protection of the laws under Amendment XIV of the Constitution of the United States, where Vermont lacks jurisdiction to apply, against out-of-state employers, the wage attachment provisions of 15 VSA 780-790 to enforce maintenance and child support in the divorce statutory scheme?

A. Plaintiff has no property or earnings in Vermont subject to judgment and attachment in favor of Defendant.

B. Defendant does have property and earnings in Vermont subject to judgment and attachment in favor of Plaintiff.

C. The Vermont legislature has made no provision to acquire jurisdiction over the non-resident employers of the non-resident divorce plaintiffs it admits to its courts.

D. Residence of employer is no adequate proxy for the legislative purpose in providing for wage attachment in divorce action.

E. The wage attachment provisions of 15 VSA 780-790 provide a special remedy and relief in the divorce statutory scheme, in addition to the usual procedures for enforcement of money judgments.

F. The issue is jurisdictional and arises when the parties seek entry into the court, prior to any actual determination.

The Court says, at the end of its decision of June 1, 1990, that

"Defendant raises numerous constitutional arguments in her brief, claiming violations of due process, equal protection, and full faith and credit. These assertions are decidedly without merit, and we decline to consider them here."

Due process requires that the Court consider these Federal claims before holding them "without merit." In order to hold them "without merit" the Court must have considered them, and should therefore present its reasoning and Federal authorities, as against Defendant's as briefed.